Supreme Court, U. S.
FILED
NOV 15 1976
MICHAEL RODAK, JR., CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-678

SHELL OIL COMPANY,
Petitioner

V.

ANNE M. DARTT,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND APPENDICES

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In The
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NO. _____

SHELL OIL COMPANY,
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V.

ANNE M. DARTT,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND APPENDICES

Shell Oil Company, Petitioner, respectfully petitions for a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-styled case on August 19, 1976, in which the Court reversed a district court decision dismissing the instant action for failure of the Respondent to timely file a Notice of Intent to Sue in accordance with

Section 626(d)(1) of the Age Discrimination In Employment Act (29 U.S.C. §626(d)(1)).

OPINIONS BELOW

The decision and order of the United States District Court for the Northern District of Oklahoma are reported at ___ F. Supp.___, 10 FEP Cases 844 (N.D. Okla. 1975) (Appendix A, infra, pp. 1a-15a). The opinion of the United States Court of Appeals for the Tenth Circuit is reported at ___ F.2d ___, 13 FEP Cases 12 (10th Cir. 1976) (Appendix B, infra, pp. 16a-26a). The Order denying the Petition for Rehearing is not reported. (Appendix C, infra, p. 27a)

JURISDICTION

The opinion of the Court of Appeals was filed on July 22, 1976. A timely Petition for Rehearing was filed with the Court on August 3, 1976, and that Petition was subsequently denied on August 19, 1976.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1) Whether timely compliance with the notice-of-intent-to-sue requirement of 29 U.S.C. §626(d) is a substantive jurisdictional prerequisite to suit;

2) Whether the *de facto* purposes of the notice requirement were fulfilled by Respondent's oral complaint to the Department of Labor which failed to state any intent to maintain a private lawsuit;

3) Whether any equitable tolling of the notice requirement is permissible where:
   a) Petitioner was not responsible for Respondent's failure to meet the time limitations;
   b) Petitioner complied with all statutory requirements designed to notify employees of their rights under the Age Discrimination in Employment Act.

4) Whether an indefinite tolling of the time to satisfy the notice requirement is warranted where:
   a) Respondent had acquired the means of knowledge of the notice requirement;
   b) Respondent was pursuing a permissive administrative remedy.

5) Whether the Court of Appeals incorrectly substituted its judgment for that of the district court in deciding that an equitable tolling was warranted in this case.

STATUTES INVOLVED

This case involves the interpretation and application of Section 626 of the Age Discrimination In Employment Act (29 U.S.C. §626). The text of that statute is set forth in Appendix D, infra, pp. 29a.

STATEMENT OF THE CASE

The Respondent, Mrs. Dartt, was employed by the Petitioner, Shell Oil Company, on January 3, 1966, at which time she was forty-four years old. Mrs. Dartt was terminated on July 31, 1973 and was fifty-one years old at the time of her t rmination.

Mrs. Dartt believed that her termination was due to her age, and she immediately contacted an attorney who was a member of a club to which she belonged. This attorney referred her to another attorney, who advised Mrs. Dartt that "You don't need an attorney. You need to go to the Federal Wage and Hour Department."

Mrs. Dartt then decided to go to the U.S. Department of Labor, Wage and Hour Division, to register her complaint. Her stated reason for so doing was:

> I thought that the Department of Labor would take care of everything and I frankly thought an attorney would be an added expense and if the Department of Labor would handle it, why bother with an attorney.

Mrs. Dartt met with J. Dean Speer, Assistant Area Director of the local Wage and Hour office on or about August 9, 1973, at which time she made an oral complaint. Mr. Speer contacted Shell officials shortly thereafter, and advised them that Mrs. Dartt had made a complaint, but had not filed a Notice of Intent to Sue.

Mr. Speer asked the Shell officials if they were interested in pursuing a possible settlement of the case, or if they preferred to undergo an investigation. Shell expressed

no interest in settlement, and, in November of 1973, Mr. Speer requested a large volume of statistical data from Shell.

While Shell was in the process of compiling this data, Mr. Speer had several different conversations with Mrs. Dartt regarding the status of her case, and advised her that it might take up to a year to complete his investigation. Mrs. Dartt never inquired as to whether she could dispense with efforts of the Department of Labor and bring her own suit, nor did Mr. Speer advise her that she could file her own lawsuit.

On March 5, 1974, Mr. Speer sent a letter to Mrs. Dartt, which letter contained a pamphlet which set forth the fact that private lawsuits could be maintained if a notice of intent to sue was filed within 180 days after the alleged violation occurred. Mrs. Dartt testified that this letter gave her knowledge for the first time of the notice requirement.

Mrs. Dartt immediately contacted her present attorney, who advised her that she had probably missed the time limits, but that a notice should nonetheless be filed. This attorney filed a notice of intent to sue on behalf of Mrs. Dartt on or about March 14, 1974. This notice was filed 216 days after the termination of Mrs. Dartt.

Mr. Speer received the notice and processed it, because he had been given instructions not to take any

position on timeliness. He contacted Shell officials and actively pursued the possibilities of settlement. These conciliation efforts proved unsuccessful, and Mr. Speer so notified Mrs. Dartt.

Mrs. Dartt subsequently filed suit against Shell, pursuant to the A.D.E.A. provisions making it unlawful to discriminate against employees aged 40 to 65 because of their age. Shell filed a Motion to Dismiss, on the grounds that the Complaint revealed on its face that Mrs. Dartt had failed to timely file a notice of intent to sue.

After two evidentiary hearings, the District Court held that the filing of a timely notice of intent to sue was a mandatory jurisdictional requirement. The District Court found that the initial oral complaint did not fulfill the requirements of Section 626(d), because the oral complaint never notified Shell during the 180-day period that Mrs. Dartt intended to sue. The District Court further found that the oral complaint would not toll the notice period, because the registering of an oral complaint was a permissive act which was not a prerequisite to filing a private lawsuit. The District Court finally held that no equitable tolling was warranted under the facts of this case, because Shell had not prevented Mrs. Dartt from timely compliance with the notice requirement.

In discussing the relative equities of this case, the District Court found that Mrs. Dartt could not rely upon the omission of the Department of Labor in failing to tell

her of the notice requirement, because the Department of Labor had no statutory obligation to volunteer this information. The District Court concluded that, in the final analysis, Mrs. Dartt was responsible for her own failure to meet the time limits, because she had not inquired into her rights or what was necessary to preserve them. The District Court found that Mrs. Dartt had constructive notice of the notice requirement through the posting of the A.D.E.A. posters by Shell, and ruled that it was "just" to require Mrs. Dartt to rely upon such remedies as the Department of Labor might seek on her behalf, where she had not actively sought to pursue any private remedy.

The Court of Appeals reversed, holding that the oral complaint by Mrs. Dartt fulfilled the *de facto* purposes of the Section 626(d) requirement, and resulted in an indefinite tolling of that requirement to the time when she actually filed her formal notice of intent to sue. Such a tolling was required, according to the Court of Appeals, because Mrs. Dartt had promptly followed private legal advice on two occasions and had sought to present her claim to the Department of Labor.

The Court of Appeals rejected the findings of the District Court that Mrs. Dartt had presumptive knowledge of the law and constructive knowledge of the statute by means of the A.D.E.A. posters posted by Shell. The Court of Appeals held that it could not "in good conscience" hold Mrs. Dartt to timely compliance with the Section

626(d) notice requirement based upon the language of these posters.

The Court of Appeals viewed as immaterial the fact that Shell had never been informed, at any time within the 180-day period, that Mrs. Dartt was intending to file suit. The Court of Appeals further viewed as immaterial the fact that Shell was not responsible for the contents of the A.D.E.A. posters. Finally, the Court of Appeals viewed as immaterial the fact that Shell was not legally responsible for the failure of either Mrs. Dartt's first attorney or the Department of Labor to advise her of the notice requirement.

Although the Court of Appeals recognized that early notice of an impending lawsuit gives an employer added impetus to engage in conciliation, the Court of Appeals found that the oral complaint by Mrs. Dartt adequately put Shell on notice of the instant action. The Court of Appeals thereby rejected the findings of the District Court that the oral complaint did not, in fact, effectively notify Shell that Mrs. Dartt was going to bring a civil action against it. The Court of Appeals likewise rejected the finding of the District Court that the relative equities were evenly balanced between Shell's failure to receive a timely notice and the failure of Mrs. Dartt to file a timely notice, warranting the leaving of Mrs. Dartt to Labor Department actions on her behalf. The Court of Appeals

therefore reversed and remanded the case for trial.

REASONS FOR GRANTING THE WRIT

A. THE DECISION BELOW PRESENTS A DIRECT CONFLICT WITH THE DECISIONS OF THIS AND OTHER COURTS AND WITH THE LEGISLATIVE HISTORY OF THE A.D.E.A.

1. The Court of Appeals ruled that timely compliance with the Section 626(d) notice requirement is not a substantive jurisdictional requirement, but that the time period contained therein is analogous to a statute of limitations. As such, the Court of Appeals ruled that the time period is subject to equitable modifications under certain circumstances. This Court has never addressed the issue of the manner in which the time limits set forth in Section 626(d) should be treated.

The question presented is an important one, which should be decided by this Court. There is a clearcut split of authority in the Circuit Courts as to the manner in which the Section 626(d) requirement should be construed.

All of the Circuits, except the Tenth Circuit, appear to be of the view that timely compliance with the time limitation set forth in Section 626(d)(1) is a substantive jurisdictional precondition to suit, which is governed by those decisions of this Court holding that such limitation periods "must be strictly adhered to by the judiciary."[1]

[1] *Kavanaugh v. Noble*, 332 U.S. 535, at 539 (1947).

The Tenth Circuit, on the other hand, appears to view the instant case as controlled by that line of cases allowing equitable modifications of statutes of limitations.[2]

Both the Fifth and Sixth Circuits have rejected the argument that the Section 626(d) requirement is analogous to the F.E.L.A. statute of limitations problem presented in *Glus, infra.* In *Ott v. Midland-Ross Corp.*, 523 F.2d 1367 (6th Cir. 1975), the Sixth Circuit pointed out that A.D.E.A. lawsuits are governed by a separate statute of limitations set forth in 29 U.S.C. §255. While this separate statute of limitations was governed by the *Glus* tolling principle, the Sixth Circuit held that the Section 626(d) was not. The Fifth Circuit reached the identical conclusion in *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir. 1974), holding that timely compliance with the Section 626(d) notice requirement "is simply a prerequisite to the right to file any suit whatsoever under the ADEA" (494 F.2d at 487).

These Circuits, as well as other courts, have found support in both the statutory language and the legislative history of the A.D.E.A. for the conclusion that timely compliance with the notice requirement is mandatory. The section of the Act in question specifically provides that the notice "shall be" filed within 180 days of the alleged unlawful practice. The House, in enacting Section 626,

[2]See, e.g., *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959); *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965).

referred to the mandatory nature of complete compliance with the Section by describing such as a "condition precedent" to suit.[3] The Senate Report stated that "in the case of suits brought by individuals, notice of intent to sue *must* be given the Secretary of Labor within 180 days after the alleged unlawful practice occurred . . ."[4]

Based upon this clear statutory language and legislative history, virtually every court which has addressed the issue has ruled that timely compliance with the notice requirement is an integral part of the right to maintain a private suit, absent which the court is divested of jurisdiction. In *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975), the Eighth Circuit stated that timely compliance with Section 626(d) is a jurisdictional requirement, and indicated that it would treat untimely compliance with the Section in the same manner as it did in the Title VII case of *Hinton v. CPC International, Inc.*, 520 F.2d 1312 (8th Cir. 1975). In the *Hinton* case, the plaintiff failed to file suit within 90 days after receipt of his Right-To-Sue letter from the E.E.O.C., in reliance upon the agreement of the defendant not to raise the issue of timeliness while the parties engaged in pre-suit settlement negotiations. Suit was later filed, and the district court

[3]H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967); 1967 U.S. Code Cong. and Admin. News pp. 2213, 2218. See also, 1967 U.S. Code Cong. and Admin. News p. 2223.

[4]S. Rep. No. 723, 90th Cong., 1st Sess. (1967), 113 Cong. Rec. 31251. (Emphasis supplied.)

dismissed the action *sua sponte* for lack of jurisdiction. The Eighth Circuit affirmed, holding that timely compliance was a jurisdictional prerequisite to suit, not subject to equitable modifications.

Similarly, in *Edwards v. Ka'ser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195 (5th Cir. 1975), the Fifth Circuit rejected a claim by the plaintiff that the defendant had wrongfully concealed the existence of the plaintiff's A.D.E.A. rights by failing to post the statutory notices required by the Department of Labor, thereby committing constructive fraud. There, the argument by the plaintiff was similar to that presented in *Glus, supra*. The Fifth Circuit reaffirmed its conclusion, stated first in *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir. 1974), that timely compliance with the Section 626(d) notice requirement "is simply a prerequisite to the right to file any suit whatsoever under the ADEA." 515 F.2d 1195, at 1199.

The Sixth Circuit has reached the same conclusion in three separate cases. In *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1975), the plaintiff argued that the employer had wrongfully concealed his cause of action, and that the time for filing the Section 626(d) notice was thereby tolled. The Court expressed grave doubts that any such tolling would be permissible, as the statute created an "imperative requirement" which was expressed in "unequivocal statutory language." (521 F.2d 632, at 634)

Similarly, in *Eklund v. Lubrizol Corp.*, 529 F.2d 247 (6th Cir. 1976), the Sixth Circuit held that the "imperative nature" of the Section 626(d) notice requirement precluded any equitable tolling of the requirement. There, the plaintiff had believed that there was an adequate state remedy available, and he attempted to pursue it. His notice of intent to sue was filed 299 days after his discharge. The District Court dismissed the action for lack of jurisdiction, finding that the state law was insufficient to allow the plaintiff to invoke the 300-day notice period allowable under 29 U.S.C. §626(d)(2), and that the plaintiff should have filed within 180 days. The Sixth Circuit affirmed, even though there were clear equities in the plaintiff's favor. Finally, in *Ott v. Midland-Ross Corp., supra*, the Sixth Circuit allowed a tolling of the Section 255 statute of limitations due to alleged fraud by the defendant, but refused to apply such tolling principles to the Section 626(d)(1) requirement of the timely filing of a notice of intent to sue.

The above cases reveal that the Tenth Circuit is alone among the Circuits in its conclusion that the Section 626(d) notice requirement is subject to equitable modifications. This Court should follow the rationale of *Kavanaugh v. Noble, supra*, and the great weight of Circuit Court and District Court authority,[5] and hold that the time periods

[5] *Powell v. Southwestern Bell Tel. Co.*, 494 F.2d 485 (5th Cir. 1974); *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195 *(Continued)*

set forth in Section 626(d) must be "strictly adhered to by the judiciary . . . . Remedies for resulting inequities are to be provided by Congress, not the courts."[6]

2. The Court of Appeals found that the oral complaint by Mrs. Dartt to the Departmen' of Labor fulfilled the "*de facto*" purposes of the Section 626(d) notice, and resulted in an indefinite tolling of the time period to file a formal written notice of intent to sue. The propriety of

(Footnote 5 Continued)

(5th Cir. 1975); *Law v. United Air Lines, Inc.*, 519 F.2d 170 (10th Cir. 1975); *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1976); *Ott v. Midland-Ross Corp.*, 523 F.2d 1367 (6th Cir. 1975); *Eklund v. Lubrizol Corp.*, 529 F.2d 247 (6th Cir. 1975); *Woodburn v. LTV Aerospace, Inc.*, 531 F.2d 750, 12 FEP Cases 1667 (5th Cir. 1976); *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1976); *Oshiro v. Pan American World Airways, Inc.*, 387 F. Supp. 80 (D.C. Haw. 1974); *Vaughn v. Chrysler Corp.*, 382 F. Supp. 143 (E.D. Mich. 1974); *Blankenship v. Ralston Purina Co.*, 62 F.R.D. 35 (N.D. Ga. 1973); *Burgett v. Cudahy Co.*, 361 F. Supp. 617 (D.C. Kan. 1973); *Gebhard v. GAF Corp.*, 59 F.R.D. 504 (D.C. D.C. 1973); *Price v. Maryland Casualty Co.*, 62 F.R.D. 614 (D.C. S.D. 1974); *Cochran v Ortho Pharmaceutical Co.*, 376 F. Supp. 302 (E.D. La. 1971); *Acford v. Exxon Corp.*, ___ F. Supp. ___, 12 FEP Cases 1500 (D.C. Conn. 1975); *Hughes v. Beaunit Corp.*, ___ F. Supp. ___, 12 FEP Cases 1564 (E.D. Tenn. 1976); *Brohl v. Singer Co.*, 407 F. Supp. 936, 12 FEP Cases 541 (M.D. Fla. 1976); *McGinley v. Burroughs Corp.*, 407 F. Supp. 903, 12 FEP Cases 112 (E.D. Pa. 1975); *Raynor v. Great Atlantic & Pacific Tea Co.*, 400 F. Supp. 357 (E.D. Va. 1975); *Mizugachi v. Molokai Electric Co.*, 411 F. Supp. 590, 12 FEP Cases 1085 (D.C. Haw. 1976); *Berry v. Crocker National Bank*, ___ F. Supp. ___, 13 FEP Cases 673 (N.D. Cal. 1976); *Hayes v. Southern Pacific Co.*, ___ F. Supp. ___, 13 FEP Cases 753 (C.D. Cal. 1976); *Goodman v. Heublein, Inc.*, ___ F. Supp. ___, 13 FEP Cases 26 (D.C. Conn. 1976).

[6]*Kavanaugh v. Noble*, 332 U.S. 535, at 539 (1947).

allowing such an indefinite tolling, even beyond the time when Mrs. Dartt acquired the means of knowledge of her A.D.E.A. rights, will be separately addressed below. We deal here with the question of whether Congress intended that oral complaints would be sufficient to fulfill the Section 626(d) requirements.

The question presented is an important one, which has not been decided by this Court. There is a clear conflict among the Circuits, and in the district courts, as to whether oral complaints to the Department of Labor adequately advise employers that they are faced with impending litigation. In the instant case, counsel for Mrs. Dartt stipulated to the District Court that at no time during the 180 day period did Mrs. Dartt tell the Department of Labor that she was intending to sue Shell. Rather, she simply made an oral complaint that charged Shell with age discrimination against her.

The statute expressly requires that a "notice of intent to sue" shall be "filed" within 180 days. This statutory language is clear and unambiguous, and should be enforced according to its plain and obvious meaning. Nothing was done by Mrs. Dartt within the 180 day period which evidenced an intent to sue Shell. Thus, even assuming that an oral notice might suffice, none was given here.

Moreover, the statute states that such notice must be "filed." The word "file" has traditionally been considered to mean that the claim must be made in writing, not

orally. See, e.g., *Ritter v. U.S.*, 28 F.2d 265, at 267[3] (3rd Cir. 1928); *Hughes v. Beaunit Corp.*, ___ F. Supp. ___, 12 FEP Cases 1564 (E.D. Tenn. 1976).

This clear statutory language requires that a prospective plaintiff make a written statement to the Department of Labor setting forth an intention of suing. That a mere oral complaint does not fulfill the *de facto* purposes of Section 626(d) is apparent from the legislative history and the statutory scheme enacted by Congress for enforcement of the A.D.E.A.

The 180 day notice requirement was in the original Senate bill, and was deleted from the House bill. The provision was restored by the Senate when it considered the House-passed bill, and the House concurred in its restoration.[7] In discussing the reasons for the Section 626(d)(1) requirement, Senator Javits stated that such was "intended to answer some of the disquiet in American businesses . . . keeping also in mind the practical problems of administration . . . ."[8]

In the enactment of the A.D.E.A., Congress expressed its intention that the majority of age discrimination complaints would be administratively processed by the Department of Labor. A very limited right to bring a private

[7]See the excellent analysis of the legislative history in *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485, at 487-488 (5th Cir. 1974).

[8]113 Cong. Rec. 35056

action was preserved for only those plaintiffs who moved quickly to bring their own lawsuit. Persons who did not act quickly to bring their own lawsuits were left to the administrative actions of the Department of Labor, which is under no similar requirement to act within 180 days.

There were legitimate reasons for Congress to have so circumscribed a private right of action. It is a recognized fact in business circles that litigation, even if frivolous, is very expensive. An employer against whom an individual suit is brought under the A.D.E.A. runs the risk of incurring not only the expenses of backpay and its own litigation expenses, but also the litigation expenses of the plaintiff.[9] When faced with these prospects while the total amount of backpay is still relatively small, the employer has a significant impetus to settle the case.[10]

However, as the backpay amounts grow larger through the passage of time, the employer may be in a position to ill-afford the added cost in the settlement of the payment of an attorney fee to counsel for the plaintiff, with a resultant negative impact on successful settlement. Moreover, employers obviously considered it preferable to have the Department of Labor administratively "weed out" un-

[9]29 U.S.C. §626(b), 29 U.S.C. §216(b).

[10]See the analogous Title VII case of *EEOC v. Hickey-Mitchell Co.*, 507 F.2d 944, 8 EPD ¶9834 (8th Cir. 1974) wherein the Eighth Circuit found that even the most recalcitrant employer is more likely to settle when told that it will be sued. The Eighth Circuit found substantial prejudice to the employer by the failure of EEOC to timely notify it that suit was to be filed.

founded complaints in the administrative process, as they lobbied extensively for the short limitation period on private lawsuits.

Congress was certainly aware of these factors when it established the 180 day period for the filing of notices of intent to sue. Shell was prejudiced, both presumptively and in fact, by the lack of any timely notice to it that Mrs. Dartt intended to bring suit. Shell was entitled to the early opportunity to make an informed business decision, including consideration of added litigation expenses, as to whether conciliation of the Dartt complaint was advisable.

Shell was further entitled, after 180 days elapsed, to rely upon the fact that no private suit could be brought against it. Therefore, Shell had no need to take into account any litigation expenses incurred by Mrs. Dartt in setting aside reserves against possible litigation losses. Likewise, in making its own budgetary plans, Shell could reasonably budget a smaller amount for its own counsel fees, due to the lesser need for attorney time during the administrative process.

The majority of the courts have found that employers are not adequately notified by a mere oral complaint that they will be sued, and that to treat such an oral complaint as fulfilling the *de facto* purposes of Section 626(d)(1) would negate the clear Congressional intent. In *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir. 1974), the plaintiff registered an oral complaint with the

Department of Labor within the 180 day period, but did not file a notice of intent to sue until after the 180 days had expired. The plaintiff argued that her oral complaint, together with the informal action on her behalf by the Department of Labor, was sufficient to satisfy or, at least, toll the notice period. The Fifth Circuit dismissed her suit, holding that the oral complaint simply did not equate to a statement of a "personal intent to commence a private lawsuit." (494 F.2d 485, at 489)

Similarly, in *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1976), the Sixth Circuit held that an oral complaint to the Department of Labor "does not constitute notice of intent to sue as mandated by the statute." (521 F.2d at 634) Significantly, the Sixth Circuit cited with approval the decision by the District Court in the instant case in support of the above holding.

Several district courts have also found that the registering of an oral complaint with the Department of Labor does not give the employer notice that it will be sued, and therefore does not comply with the statute. In *Berry v. Crocker National Bank*, ___ F. Supp. ___, 13 FEP Cases 673 (N.D. Cal. 1976), the plaintiffs made oral complaints to the Department of Labor, but did not file timely notices of intent to sue. They argued that their oral complaints were sufficient to put their employer on notice of their claims, but the Court disagreed and dismissed, relying on *Hiscott, supra*. In a similar case, *Goodman v. Heublein,*

Inc., ___ F. Supp. ___, 13 FEP Cases 26 (D.C. Conn. 1976), the District Court granted a partial motion to dismiss as to claims occurring prior to 300 days before a written notice of intent to sue was filed. The plaintiff had argued that his earlier oral complaints to the Department of Labor constituted notice of intent to sue, but the District Court rejected that claim, relying on *Powell* and *Hiscott, supra*.

Finally, in *Hughes v. Beaunit Corp.*, ___ F. Supp. ___, 12 FEP Cases 1564 (E.D. Tenn. 1976), the District Court refused to consider an oral notice of intent to sue as fulfilling the Section 626(d) requirements. There, the plaintiff gave an actual statement of his intention to sue (rather than only making a complaint) within 180 days. His formal written notice was filed on the 181st day. The District Court refused to consider the oral notice as meeting the statutory requirements, and dismissed.

All of these cases present a clearcut conflict with the instant case as to whether an oral complaint fulfills the *de facto* purposes of the Section 626(d) notice. Of equal significance is the interpretation given by the Department of Labor as to what actions satisfy the Section 626(d) notice requirement. In an opinion letter issued by the Department of Labor regarding the manner in which the Section 626(d) requirement is satisfied, the Department stated:

> No particular form is needed to notify the Secretary of Labor of an intent to file suit under the Age Discrimination in Employment Act. However, such notice should be provided in writing . . . .[11]

This is an administrative interpretation of the Act which is entitled to "great deference."[12] It lends support to the conclusion that a written notice setting forth an intent to sue is required by the Department of Labor before it sets in motion its conciliation functions and its analysis of the case as one for intervention or preemptive suit.

Indeed, the actions by the Department of Labor in the instant case belie any conclusion that the administrative processing of Mrs. Dartt's oral complaint satisfied the *de facto* purposes of Section 626(d). The pre-notice "conciliation" was little more than an inquiry as to whether Shell wanted to settle, which seems far short of the concerted conciliation efforts which the statute requires of the Department of Labor. Moreover, prior to receipt of the written notice filed by Mrs. Dartt, the Department not only did not inform Shell that Dartt was intending to sue, but affirmatively told Shell that she had not filed a notice of intent to sue. Finally, when the Department did receive the written notice filed by Mrs. Dartt, it did not rely upon its prior contacts with Shell as fulfilling either the notice or conciliation functions prescribed by Section 626(d). Instead, it gave Shell written notice of Mrs. Dartt's action, and began to vigorously pursue possible settlement.

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[11] *Burgett v. Cudahy Co.*, 361 F. Supp. 617, at 621 (D.C. Kan. 1973).

[12] See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, at 435 (1971).

The Court of Appeals erred, both in law and in fact, in holding that the oral complaint by Mrs. Dartt fulfilled the *de facto* requirements of Section 626(d). As a result, this Court must reverse.

3. The third issue presented is whether, assuming *arguendo* that equitable tolling of the Section 626(d) notice period may be appropriate in some instances, such a tolling is appropriate where the employer did nothing to prevent the complainant from fulfilling the statutory requirements. It has been traditionally held that, while tolling of a "statute of limitations" is permissible where a defendant has misled a plaintiff,[13] the actions of a third party not in privity with a defendant do not warrant any tolling.[14]

The record reveals no evidence that Shell was in any way responsible for the failure of Mrs. Dartt to timely file her notice of intent to use.[15] Rather, all of the evidence

[13]See, e.g., *Glus v. Brooklyn Eastern District Terminal, supra; Bailey v. Glover,* 21 Wall. 342, at 348, 22 L. Ed. 636.

[14]See, e.g., *Cato v. South Atlantic & Gulf Coast Dist. of Intl. Longshmn. Assn.*, 364 F. Supp. 489, at 493 (S.D. Tex. 1973), affd. per curiam 485 F.2d 583 (5th Cir. 1973). See also, *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195 (5th Cir. 1975), wherein the Fifth Circuit expressly declined to charge the employer with the derelictions of third parties — the plaintiff's attorneys.

[15]Although the Decision of the Court of Appeals seems to suggest that Shell was indirectly responsible for Mrs. Dartt's predicament by deliberately stalling in furnishing the data requested by the Department of Labor, a reading of the testimony of Mr. Speer yields no such conclusion. Moreover, when this argument was raised for the first time on appeal, Shell submitted an Affidavit by its Manager of Em-

(Continued)

reflects that the failure of Mrs. Dartt to timely file her Notice of Intent to Sue was due to her failure to inquire as to the conditions under which she could maintain a private lawsuit. Indeed, the record establishes that, had Mrs. Dartt so inquired, the Department of Labor would have informed her of the time limits, as its failure to do so was a simple oversight.

This Court is, therefore, presented with the important question of whether an equitable tolling is permissible where the plaintiff missed the time limits through simple ignorance of the law. The cases relied upon by the Court of Appeals lend no assistance in this inquiry, as all of those cases dealt with situations where the defendant was found to have wrongfully caused the plaintiff to miss the time limits.

In the case of *McGinley v. Burroughs Corp.*, 407 F. Supp. 903 (E.D. Pa. 1975), relied upon by the Court of Appeals, the plaintiff claimed that the defendant had willfully and fraudulently concealed the hiring of others to fill his former position, and that he timely filed as soon as he became aware of the true facts. The District Court, on traditional equitable grounds, tolled the Section 626(d) requirement during the period of the alleged fraud. In an

(Footnote 15 Continued)
ployee Relations, which reveals that the delays were due solely to the volume of data requested. (Appendix E, p. 38a) This Affidavit was never objected to, or rebutted, by either Mrs. Dartt or the Department of Labor.

analogous case under Title VII, *Reeb v. Equal Opportunity Atlanta*, 516 F.2d 924 (5th Cir. 1974), the Fifth Circuit tolled the time for filing an EEOC charge where the plaintiff alleged that the defendant had wrongfully concealed the reasons for her discharge.[16]

Similarly, in *Bishop v. Jelleff Associates, Inc.*, 398 F. Supp. 579 (D.C. D.C. 1974), the District Court completely excused the failure of the plaintiffs to meet the Section 626(d) requirement where their employer failed to post the required age discrimination posters. The Court held that the plaintiffs should not be penalized where their employer failed to advise them of their rights under the A.D.E.A. Likewise, in *Skoglund v. Singer Co.*, 403 F. Supp. 797 (D.C. N.H. 1975), the District Court preliminarily found that it might toll the Section 626(d) requirement if the defendant employed had failed to post the required age posters and had thereby prevented the plaintiff from acquiring knowledge of his rights. In a later decision, not cited by the Court of Appeals,[17] the District Court found insufficient equities warranting a tolling, and dismissed the plaintiff's action.

This is not a case where the defendant acted in any

[16] The Fifth Circuit has subsequently severely limited the *Reeb* decision to the facts of the case. See *East v. Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975); *Freeman v. Motor Convoy, Inc.*, 409 F. Supp. 1100, 11 EPD ¶10,650 (5th Cir. 1975).

[17] *Skoglund v. Singer Co.*, 403 F. Supp. 797 (D.C. N.H. December 12, 1975), 13 FEP Cases 253.

way to mislead the plaintiff. Likewise, it is not a case where a government agency misinformed the plaintiff as to the requirements of the statute.[18] Instead, it is a case of simple ignorance of the time limitations, which should be governed by the oft-repeated maxim that "mere ignorance of his rights on the part of the plaintiff . . . will not toll the statute of limitations."[19]

The decision of the Court of Appeals in the instant case is in direct conflict with the decision of the Fifth Circuit in *Edwards v. Kaiser Aluminun & Chemical Sales, Inc.*, holding that no equitable tolling is permissible where the ignorance by the plaintiff was not caused by the defendant. It is likewise in conflict with a number of district court decisions which refused to allow any tolling where the ignorance of the plaintiff of the requirement was not attributable to the defendant.[20]

This Court has never addressed the issue presented herein, and should resolve the conflict presented by the decision of the Court of Appeals.

B. THE CASE RAISES VITAL QUESTIONS

[18] See, e.g., *Arnold v. Hawaiian Telephone Co.*, ___ F. Supp. ___ (D.C. Haw. 1975), 12 FEP Cases 400.

[19] *Scroggin Farms Corp. v. McFaddin*, 165 F.2d 10, at 15 (8th Cir. 1948).

[20] *Hughes v. Beaunit Corp.*, ___ F. Supp. ___, 12 FEP Cases 1564 (E.D. Tenn. 1976); *Berry v. Crocker National Bank*, ___ F. Supp. ___, 13 FEP Cases 673 (N.D. Cal. 1976); *Goodman v. Heublein, Inc.*, ___ F. Supp. ___, 13 FEP Cases 26 (D.C. Conn. 1976).

CONCERNING THE INTERPRETATION OF THE A.D.E.A. WHICH HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

1. The Court of Appeals refused to charge Mrs. Dartt with either presumptive or constructive notice of the provisions of the A.D.E.A., because of the inadequacy of the A.D.E.A. posters posted by Shell throughout its facility. The Court then tolled the time limits set forth in Section 626(d)(1), due to the lack of actual knowledge by Mrs. Dartt of the requirement.

The questions raised by such a holding are vital to the administration of not only the A.D.E.A., but of many other statutes. Shell has set forth in the Appendices to this Petition copies of the posters issued by E.E.O.C. under Title VII,[21] the Department of Labor under the F.L.S.A.,[22] and the old and new A.D.E.A. posters.[23] None of these posters set forth the time limitations for the filing of charges or the bringing of suit.

Utter chaos will result if the time limitations under these statutes are considered tolled because of the supposed inadequacies of these posters. More importantly, it would be patently unfair to employers to charge them with responsibility for the contents of posters which they did not draft and which they believed in good faith to be adequate.

[21] Appendix F.

[22] Appendix G.

[23] Appendices H and I.

Indeed, charging Shell with the responsibility for the inadequacy of these posters seems clearly contrary to the statute, which insulated employers from liability where they relied on official agency action.[24] Here, the posters were officially issued by the Department of Labor, and posted by Shell in accordance with 29 U.S.C. §627. Shell is entitled to be relieved of responsibility if such posters are found to be inadequate.

In addition, the refusal of the Circuit Court to charge Mrs. Dartt with presumptive or constructive knowledge of the A.D.E.A. is in conflict with literally hundreds of decisions by this and other courts. It would be impossible for Shell to cite all of the cases in which plaintiffs have had their lawsuits dismissed, based only upon presumptive knowledge.[25] In the vast majority of these cases, there was no notice posted — in the courthouse or elsewhere — which advised these plaintiffs of even the existence of their statutory rights.

Under the A.D.E.A., both the Fifth and Sixth Circuits have held that A.D.E.A. plaintiffs are charged with presumptive knowledge of the Section 626(d) requirement, even though their employers did not post the age posters required by the Department of Labor.[26] Here, Shell was

[24] See 29 U.S.C. §626(e), incorporating 29 U.S.C. §259.

[25] See, e.g., *Kavanaugh v. Noble, supra.*

[26] *Edwards v. Kaiser Aluminum & Chemical Sales, Inc., supra;* and *Hiscott v. General Electric Co., supra.*

found to have posted the required posters, and should be accorded the benefit of the presumption. The Court of Appeals committed clear error in holding that Mrs. Dartt did not have presumptive and constructive knowledge of the A.D.E.A., and its decision must be reversed.[27]

To do otherwise would require time limitations to run from actual notice of the limitation and require case-by-case determinations of when that actual knowledge was acquired. Such an approach has been consistently eschewed by the Congress and this Court, except in very limited instances, such as fraud.[28] Even in those cases, the limitation period usually runs from the time the person reasonably should have known of the fraud. Assuming *arguendo* that such a rule should apply here, Mrs. Dartt acquired the means of knowledge of her private right of action when she contacted an attorney and then went to the Labor Department. Had she conducted a reasonable inquiry into her rights to bring a private lawsuit at that time, she would have learned of them. Shell should not be charged with her failure to make such an inquiry.[29]

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[27] The Court of Appeals failed to discuss how, if at all, a more detailed poster would have benefited Mrs. Dartt. In the District Court, Mrs. Dartt claimed that the A.D.E.A. posters had not been posted. However, the District Court found that her testimony was "unbelievable," and that the posters were conspicuously posted throughout the facility where she worked.

[28] See, e.g., *Glus v. Brooklyn Eastern District Terminal, supra.*

[29] See *Edwards v. Kaiser Aluminum & Chemical Sales, Inc., supra; Berry v. Crocker National Bank, supra.*

2 The District Court found that, under the A.D.E.A., there are two separate and distinct enforcement mechanisms. Under the first enforcement mechanism, a complainant may go to the Department of Labor at any time within two years and register a complaint of age discrimination. The complainant places full reliance on the Department of Labor to protect his or her rights, and is bound by any settlement reached by the Department.

Under the second enforcement mechanism, the complainant invokes an entirely different procedure. All that this person must do to be able to bring a private action is to file a notice of intent to sue within 180 days after the alleged violation, and then afford the Department a period of sixty days in which to mediate the dispute. This complainant need not ever invoke the first enforcement mechanism and, unlike one who invokes the first mechanism, is free to reject any Department settlement of his case.

The District Court found that a complainant who wishes to bring a private A.D.E.A. action is not required to invoke the first enforcement mechanism, and one who does so is seeking a permissive administrative remedy. The District Court followed the long line of cases holding that pursuit of a permissive remedy does not toll a limitation period,[30] and refused to toll the Section 626(d) notice

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[30] *Steel Improvement & Forge Co. v. U.S.*, 355 F.2d 627 (Ct. Cl. 1966); *O'Callahan v. U.S.*, 451 F.2d 1390 (Ct. Cl. 1971). See also, *Johnson v. Railway Express Agency, Inc.*, ___ U.S. ___, 95 S. Ct. 1716 (1975).

period based upon Mrs. Dartt's oral complaint to the Department of Labor.

The Court of Appeals reversed, and held that the registering of the oral complaint by Mrs. Dartt, and the subsequent administrative actions taken by the Department on her behalf, indefinitely tolled the Section 626(d) time period up to the time when Mrs. Dartt filed her written notice of intent to sue. The questions presented by the allowance of this indefinite tolling are clearly important ones, which vitally affect the administration and enforcement of the A.D.E.A.

Those courts which have allowed a tolling of the Section 626(d) notice period, due to alleged misdeeds by the defendant employers, have usually tolled the time periods only until the plaintiffs became aware of the alleged fraud or of their A.D.E.A. rights.[31] Only one court has allowed an indefinite tolling similar to that permitted here.[32]

Two Circuit Courts have discussed possible tolling of the Section 626(d) notice period, but have rejected any concept of indefinite tolling. In *Edwards v. Kaiser Alum-*

[31] *McGinley v. Burroughs Corp.*, 407 F. Supp. 903 (E.D. Pa. 1975); *Skoglund v. Singer Corp.*, 403 F. Supp. 797 (D.C. N.H. 1975). Cf. *Reeb v. Equal Opportunity Atlanta*, 516 F.2d 924 (5th Cir. 1974); *Glus v. Brooklyn Eastern District Terminal, supra; Bailey v. Glover*, 21 Wall. 342, at 348, 22 L. Ed. 636.

[32] *Bishop v. Jelleff Associates, Inc.*, 398 F. Supp. 579 (D.C. D.C. 1974).

inum & Chemical Sales, Inc., 515 F.2d 1195 (5th Cir. 1975), the Fifth Circuit rejected an argument by the plaintiff that his employer's misdeeds indefinitely tolled the time for filing his notice of intent to sue. The Circuit noted that the plaintiff had failed to file within 180 days after consulting an attorney (which gave him the means of knowledge of his A.D.E.A. rights) or within 180 days after he acquired actual knowledge of his A.D.E.A. rights. The Circuit reserved a ruling on whether tolling might ever be appropriate, but held that it would not, in any event, allow an indefinite tolling.

In *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1976), the Sixth Circuit rejected an argument by the plaintiff that an employer's misdeeds indefinitely tolled or excused the Section 626(d) requirement. The Court further noted that, even if a tolling of the requirement was permissible, the 180 day period would begin to run again at some point. (521 F.2d at 634)

In addition, in a somewhat analogous Title VII case relied upon heavily by the Court of Appeals below,[33] the Fifth Circuit held that a tolling of the Title VII charging requirement would be permitted only until the time when "the facts which would support a cause of action are apparent or should be apparent . . . ." (516 F.2d 924, at 931)

Thus, the decision of the Court of Appeals allowing an indefinite tolling of the Section 626(d) requirement

[33] *Reeb v. Equal Opportunity Atlanta, supra.*

past the time when Mrs. Dartt acquired the means of knowledge of her A.D.E.A. rights is plainly wrong. Even if the time period was tolled due to the inadequacy of the posters, it began to run again when Mrs. Dartt contacted a private attorney and the Department of Labor on or before August 9, 1973 and acquired the means of knowledge of the requirement. As a result, the time limitation period would have run at least 27 days before the notice was filed. The Court of Appeals was further plainly wrong in its allowance of any tolling whatsoever because of Mrs. Dartt's use of a permissive administrative remedy.

An analogous situation to the one herein was recently before this Court in the case of *Johnson v. Railway Express Agency, Inc., supra*. The plaintiff in *Johnson* had two separate and distinct remedies, one under Title VII and one under 42 U.S.C. §1981. The plaintiff chose to use the administrative remedies under Title VII and, when he later brought suit, his §1981 claim was held time-barred.

The plaintiff argued that the limitation period under §1981 should be tolled while he pursued his alternate remedy under Title VII, but this Court rejected that argument. This Court held that, where a plaintiff has an unfettered right to invoke a certain remedy, but does not, he has slept on his rights, stating:

> The fact that his slumber may have been induced by faith in his Title VII remedy is of little relevance, inasmuch as the two remedies are truly independent. (95 S. Ct. at 1723)

This Court must reverse the decision of the Court of Appeals allowing a tolling of the Section 626(d) requirement while a complainant invokes the alternative complaint procedures available under the A.D.E.A. To do otherwise would create wholesale inconsistencies in the treatment of similarly-situated plaintiffs and defendants.

There is no doubt that plaintiffs who never went to the Department of Labor were just as ignorant of the Section 626(d) requirement as was Mrs. Dartt.[34] Their ignorance of the requirement is unchanged, whether they go to the Department of Labor to complain before[35] or after[36] the 180 days period has run. Moreover, these plaintiffs are just as ignorant of the requirement if their attorneys fail to tell them,[37] as when the Department of Labor omits to tell them. However, the employer may still have notice of the claim well within the 180 day period, even though the subsequent notice is untimely filed.[38]

If the rationale of the decision by the Court of Ap-

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[34]See, e.g., *Acford v. Exxon Corp.*, ___ F. Supp. ___, 12 FEP Cases 1500 (D.C. Conn. 1975).

[35]See, e.g., *Hughes v. Beaunit Corp.*, ___ F. Supp. ___, 12 FEP Cases 1564 (E.D. Tenn. 1976); *Goodman v. Heublein, Inc.*, ___ F. Supp. ___, 13 FEP Cases 26 (D.C. Conn. 1976).

[36]See, e.g., *Hiscott v. General Electric Co., supra.*

[37]See, e.g., *Edwards v. Kaiser Aluminum & Chemical Sales, Inc., supra; Berry v. Crocker National Bank*, ___ F. Supp. ___, 13 FEP Cases 673 (N.D. Cal. 1976).

[38]See, e.g., *Edwards v. Kaiser Aluminum & Chemical Sales, Inc., supra; Powell v. Southwestern Bell Telephone Co., supra.*

peals is allowed to stand, similarly-situated employees and employers will be subject to wholly different time limits, based upon whether the employee registered an oral complaint with the Department of Labor. The District Court correctly concluded that Congress did not intend that such an exception be carved out for oral complaints. Its decision should be affirmed.

3. The Court of Appeals held that it would not be equitable to dismiss the private suit by Mrs. Dartt. In the view of the Court of Appeals, Mrs. Dartt had acted reasonably in pursuing her complaint and was excusably ignorant of the Section 626(d) requirement. Because of her actions, and the finding of no prejudice to Shell, the Court of Appeals concluded that it would be equitable to allow her suit to continue.

The District Court had a different view of the relative equities in the instant case. The District Court believed that Mrs. Dartt had not acted reasonably in failing to inquire as to what needed to be done if she wanted to dispense with the assistance of the Department of Labor and bring her own suit. The District Court further believed that the interests of defendants and of the Department of Labor are necessarily prejudiced under the statute where no timely Section 626(d) notice is given. Weighing all of these factors, the District Court concluded that it would be "fair" to leave Mrs. Dartt's claim with the Department of Labor.

Assuming that equitable considerations come into play in the instant case, it is well-settled that the exercise of these equitable powers are committed to the sound discretion of the district courts.[39] The review powers granted to the circuit courts of appeal are "correspondingly narrow"[40] and are limited to the question of "whether there has been an abuse of discretion."[41]

Here, the District Court carefully weighed all of the circumstances, including the fact that Mrs. Dartt would still have available the use of the services of the Department of Labor in the investigation and possible litigation of her case. In the exercise of its equitable discretion, the District Court concluded that it would not be inequitable to leave Mrs. Dartt to the remedy which she selected.

The decision of the Court of Appeals makes no finding that the District Court abused its discretion. Rather, its decision appears to make a *de novo* determination that the Court of Appeals panel might have exercised their discretion in a different manner, had they sat as trial judges in the case.

This is an impermissible exercise of the power of appellate review, and must be overturned.[42]

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[39] *Burns v. U.S.*, 287 U.S. 216 (1932); *Swann v. Charlotte-Mechlenberg Board of Education*, 402 U.S. 1 (1971); *Lemon v. Kurtsman*, 411 U.S. 192 (1973).

[40] *Lemon, supra*, 411 U.S. at 200.

[41] *Burns, supra*, 287 U.S. at 223.

[42] See, e.g., *Larson v. U.S.*, 296 F.2d 167, at 170 (8th Cir. 1961).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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EXHIBIT A

[Filed Feb. 6 — 1975 Jack C. Silver, Clerk,
U.S. DISTRICT COURT]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA

CASE NO. 4-C-221

ANNE M. DARTT,
Plaintiff,

-vs-

SHELL OIL COMPANY,
Defendant.

ORDER

This case involves the construction and application of Section 7(d) of the Age Discrimination in Employment Act (ADEA), 29 U.S.A. §626(d). Plaintiff is a former employee of Defendant. She alleges that she was discharged by Defendant solely because of her age. Section 4(a) of the ADEA, 29 U.S.C. §623(a), makes it unlawful for an employer who is covered by the Act to discharge any individual because of the individual's age. The ADEA has application to individuals who are at least forty years of age but less than sixty-five years of age, 29 U.S.C. §631. Plaintiff states she was fifty-one years of age when discharged.

Defendant has filed herein a Motion to Dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b) (6), Federal Rules of Civil Procedure. It is Defendant's position that this Court lacks subject matter jurisdiction to hear this case. Although lack of subject matter jurisdiction is normally attacked through a Motion to Dismiss for lack of subject matter jurisdiction

made pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, Defendant's Motion is proper herein as Defendant attacks a defect which appears on the face of Plaintiff's Complaint. It is Defendant's position that the Complaint shows Plaintiff failed to file timely notice of an intent to sue with the Secretary of Labor as required by 29 U.S.C. §626(d). This defect, apparent on the face of the Complaint, is an affirmative defense. Affirmative defenses which appear on the face of a Complaint may be asserted by a Motion to Dismiss for failure to state a claim upon which relief can be granted. 5 Federal Practice and Procedure, Civil, Wright and Miller, §1357.

Defendant has raised a substantial jurisdictional question through its Motion to Dismiss. The Court has, pursuant to the direction of *Schramm* v. *Oakes*, 352 F. 2d 143 (Tenth Cir. 1965), held evidentiary hearings to more fully develop the facts necessary to determine the jurisdictional challenge. The pertinent facts of this case as derived from the well pleaded allegations of the Complaint and two evidentiary hearings are found to be as follows:

Plaintiff was employed by Defendant from January 3, 1966 until July 31, 1973. She was terminated at the latter date. At the date of termination Plaintiff was fifty-one years of age. During the period of Plaintiff's employment, since and after 1967, Defendant maintained posted notices informing employees of the ADEA in conspicuous places throughout the places where Defendant was employed.[1] Though Defendant testified she did not see these notices, a reasonably alert employee in the same or similar circumstances as Plaintiff would have seen them. On September 9, 1974, shortly after her termination, Plaintiff contacted Mr. J. D. Speer, an Assistant Area Director of the Department of Labor in the Tulsa, Oklahoma area. At this time

[1]These notices are required by 29 U.S.C. §627.

she complained that she had been fired because of her age. Mr. Speer did not inform Plaintiff that she had a right to maintain a civil action on her own behalf under the ADEA. He stated that he would investigate the complaint. Subsequently, Plaintiff attempted to contact Mr. Speer several times by telephone. In each instance she was informed she would be notified as soon as any action was taken on her complaint. On March 5, 1974 Speer wrote Plaintiff a letter in which he stated there would be a delay in investigating her complaint. In this letter he also informed Plaintiff she had the right to bring a civil action on the basis of her complaint. He enclosed a Department of Labor Pamphlet containing basic information concerning the ADEA. This was the first date on which Plaintiff claims she had actual knowledge of her right to maintain civil action under the ADEA. Thereafter Plaintiff contacted an attorney who, on March 14, 1974, mailed a letter to the Department of Labor addressed to the local office at Tulsa, Oklahoma, for the attention of Mr. Speer, informing the Department that the Plaintiff intended to commence a civil action against the Defendant based on alleged ADEA violations.

29 U.S.C. §626(d) reads in part as follows:

> "No civil action may be commenced by an individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed —
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, . . ."

It is Defendant's position that the face of the Complaint reveals Plaintiff did not file notice of intent to file a civil action within one hundred and eighty days of the alleged discriminatory act and that when notice was filed it was not with the Secretary as is required by the Section, but was with a local Assistant Area Director. It is Plaintiff's position that the 180 day filing period is directory and not

jurisdictional. She further contends she gave adequate notice by informing the Department of the alleged discriminatory act on her initial visit with Mr. Speer. She further contends the filing period should be tolled in this case because the Department failed to inform her of her right to bring a civil action under the ADEA. (To this same end she contends Defendant failed to perform its statutory duty of posting notice informing employees of the ADEA as is required by 29 U.S.C. §627 but the Court resolves this factual issue against Plaintiff as heretofore set out.)

With regard to Plaintiff's contention that the filing of a notice of an intent to sue with the Secretary within 180 days of an alleged discriminatory act is not a jurisdictional prerequisite to the right to maintain a civil action under the ADEA, the Court concludes Plaintiff's position is neither supported by authority nor reason.[2] Literally every reported

[2]Plaintiff relies on *Goger* v. *H. K. Porter Company, Inc.*, 492 F. 2d 13 (Third Cir. 1974) to support her contention that filing notice of intent within the statutory period is not a jurisdictional prerequisite to the right to maintain a civil action. *Goger* deals with 29 U.S.C. §626(d)(2). This section sets the time limits within which notice of intent to sue must be filed in cases falling under Section 14(b) of the ADEA, 29 U.S.C. §633(b). Section 14(b) basically provides that if a state has an agency with authority to deal with age discrimination in employment the state remedy must be attempted before a civil action under 29 U.S.C. §626(d) may be commenced. In *Goger* the plaintiff failed to avail himself of available state remedy. Instead he proceeded directly through the Department of Labor. The time limits within which the plaintiff could have commenced an action under the state law expired. The district court dismissed the action holding that the ADEA required the plaintiff to exhaust available state remedies prior to commencing a civil action. On appeal the Third Circuit held:

> "While we do not consider the failure to file a timely complaint with the appropriate state agency a mere 'technical' omission, we nonetheless consider equitable relief to be appropriate in view of the total absence, to our knowledge, of any judicial decision construing section 633(b) during the period involved here and in view

(Continued)

case which has dealt with the question has held the filing period to be jurisdictional. *Powell* v. *Southwestern Bell Telephone Company*, 494 F. 2d 485 (Fifth Cir. 1974; *Oshiro* v. *Pan American World Airways, Inc.*, 378 F. Supp. 80 (D. Hawaii 1974); *Cochran* v. *Ortho Pharmaceutical Company*, 376 F. Supp. 302 (E.D. La. 1971); *Burgett* v. *Cudahy Company*, 361 F. Supp. 617 (D. Kan. 1973); *Bunch* v. *Barnett*, 62 FRD 615 (D. S.Dak. 1974); *Gebhard* v. *GAF Corporation*, 59 FRD 504 (D.C. D.C. 1973). Also, the intent of Congress is clearly expressed in the statute. Notice of an intent to sue *shall* be filed within one hundred and eighty days of an alleged discriminatory act. Where the language of a statute is plain and unambiguous it must be given effect according to its plain and obvious meaning. 82 CJS Statutes §322(2). Thus it is the decision of this Court that filing notice of an intent to sue with the Secretary within 180 days of an act of age discrimination is a jurisdictional prerequisite to the right to maintain a civil action under 29 U.S.C. §626(d)(1).

(Footnote 2 continued)

> of the remedial purposes of the 1967 Act. In the future, however, we think the Congressional intent that state agencies be given the initial opportunity to act should be strictly followed and enforced . . ."

Plaintiff's reading of the case is incorrect. In *Goger* the court granted equitable relief under the circumstances of the case since there were no cases construing the point raised by that plaintiff on appeal. The court did hold that resort to available state remedies was a jurisdictional prerequisite to the maintenance of a civil action based on the ADEA. And the court clearly stated that in the future, now that there was a decision on point, the Congressional intent should be strictly enforced and followed. This case does not by analogy support Plaintiff's position. Indeed, it undermines her position. There are many cases holding that, in situations to which §626(d)(1) applies, filing notice of an intent to sue within 180 days of the alleged discriminatory act is a jurisdictional prerequisite to the maintenance of a civil action. Thus, Plaintiff cannot avail herself of the special circumstances of *Goger*. In fact *Goger* must, in this case, be read to support the proposition that the clear intent of Congress should be applied and enforced.

Plaintiff's second contention is that her act of informing the Department of Labor that she had been fired because of her age constitutes sufficient notice of an intention to sue to either satisfy 29 U.S.C. §626(d)'s notice requirement or to toll the running of the 180 day notice period. This argument is supported by some authority but not by reason. Plaintiff relies on *Woodford* v. *Kinney Shoe Corporation*, 369 F. Supp. 911 (N.D. Ga. 1973). The facts of *Woodford* are very similar to the facts herein. In *Woodford* the plaintiff contacted the Department one hundred and sixty days after she was fired and stated that she had been discriminated against. Apparently she did not state she intended to sue, however, the facts on this point are not specific. The court held:

> ". . . where an employee, within one hundred and eighty days of his discharge, reports to the Labor Department that he has been discharged from his job because his employer discriminates against older workers, the employee's right to file suit later under the Age Discrimination Act is preserved, even if the employee does not in so many words declare to the Department his intent to file such an action."

This decision disregards the clear mandate of 29 U.S.C. §626(d) that:

> "No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty day's *notice of an intent to file such action* . . ." (Emphasis added.)

It is difficult to equate a complaint of age discrimination made to a local wage and hour office with a notice of intent to bring a civil action filed with the Secretary of Labor. The language of Section 626 could not be clearer as to what is required. To hold that a complaint of age discrimination is a notice of intent to sue is in effect to rewrite a portion of a Federal statute. This is beyond the power of the Court.

The ADEA is enforced according to the powers, remedies and procedures provided by 29 U.S.C. §211(b), 216(b)-(d) and 217. Under 29 U.S.C. §216(c) the Secretary of Labor is authorized to sue on behalf of employees where there is a violation of the Act. Under 29 U.S.C. §216(b) the right of an employee to bring a civil action, in certain circumstances is terminated, when the Secretary commences an action. Thus, when the Secretary of Labor commences an investigation upon the basis of a complaint filed by an employee that he has been discriminated against, the employer does not necessarily have notice that the aggrieved employee intends to sue. In *Powell* v. *Southwestern Bell Telephone Company, supra*, the court stated:

> ". . . It is logical that the 180 day notice was intended to insure that potential defendants would become aware of their status and the possibility of litigation reasonably soon after the alleged discrimination since the notice goes from the Secretary of Labor on to the employer involved."

The Secretary has the power to make investigations under the ADEA, 29 U.S.C. §626(a). In the case at hand Plaintiff filed her complaint with the local wage and hour division. It in turn promised to commence an investigation and did in fact do so. The investigatory powers of the ADEA are in accordance with the powers and procedures provided by 29 U.S.C. §§209 and 211. It does not appear that under the provisions of these statutes the commencement of an investigation by the Department of Labor would effectively notify an employer that an employee intended to bring a civil action under the ADEA. Thus to hold that the mere filing of a complaint with the Department satisfies the notice requirement of 29 U.S.C. §626(d) thwarts one of the basic purposes of that section that a potential defendant become aware of its status and the possibility of litigation reasonably soon after the alleged discrimination. In fact,

as is evidenced by the facts of this case, there is no guarantee that the Labor Department investigation commenced pursuant to a discrimination complaint would even begin within a reasonably short time after the filing of the complaint. The employer would therefore not even have reason to suspect that there was some complaint against it until well after the alleged act of discrimination. This is clearly contrary to the intent of Congress.

It is apparent from the history of the ADEA that Congress was concerned with notice to an employer within a reasonable time after an alleged act of discrimination. In *Powell* v. *Southwestern Bell Telephone Company, supra,* the court noted:

> "Perhaps the most interesting feature of the origin of the 180 day notice limitation is that it appeared in the original bill as introduced in the Senate, was deleted from the House passed bill, and was restored by the amendment in the Senate when the House bill was returned for consideration by the upper chamber. The House concurred in the amendment. Its restoration, together with that of several other portions of the original Senate bill, was 'intended to answer some of the disquiet in American business . . . keeping also in mind the practical problems of administration . . .' 113 Cong.Rec. 35056 (Remarks of Senator Javits)."

It is obvious from this history that Congress attached significant importance to the 180 day notice requirement. It cannot be said that the mere filing of a complaint of discrimination with the Department of Labor fulfills the same function as the required notice of an intent to sue.

The final clause of 29 U.S.C.§626(d) reads as follows:

> "Upon receiving notice of an intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion."

The filing of notice of intent to sue performs two functions. The prospective defendant is promptly notified of the possibility of litigation. And the Secretary is induced to promptly begin informal methods of conciliation, knowing that a civil action will proceed if he does not obtain results. It cannot be said that these functions are performed by the mere filing of a complaint of age discrimination with a local office of the Department of Labor. It does not appear that in the enforcement provisions of the ADEA applicable to the Secretary that there is any requirement of promptly notifying an employer that a complaint has been filed against it. Nor does it appear that there is any requirement that the Secretary promptly act on a complaint. Therefore, the mere registration of a complaint of age discrimination with the local wage and hour division of the Department of Labor cannot be held by this Court to satisfy the notice requirement of 29 U.S.C. §626(d).

Plaintiff's final argument is that the 180 day notice period was tolled when she filed her complaint with the Department and it failed to notify her of her right to sue until after the 180 day notice period had expired. Defendant argues that Plaintiff's mere ignorance of her legal rights does not toll the running of the notice period. It is axiomatic that a person's ignorance of his legal rights will not toll the running of a statute of limitations. 54 CJS, Limitations of Actions, §205. Although a traditional statute of limitations is not involved herein, the same principle should apply. All persons are charged with knowledge of the provisions of statutes. 58 AmJur 2d, Notice, §21. Therefore, Plaintiff must be charged with notice of the provisions of 29 U.S.C. §626(d). Also, as has been previously found herein, Defendant maintained, throughout the period of

Plaintiff's employment, posted notices regarding the ADEA. These notices were conspicuously posted as is required by 29 U.S.C. §627. Although Plaintiff testified that she never saw the notices, her testimony is unbelievable. It must be concluded that a reasonably aware person in the same or similar circumstances would have seen the notices. Thus, Plaintiff had not only presumptive notice of the content of the ADEA but she also must be charged with constructive knowledge from the posted notices which would lead a reasonable person to know or to inquire into his legal rights under the ADEA.

Defendant also argues, convincingly, that the mere filing of a complaint with the Department of Labor by Plaintiff did not toll the notice period since such action is permissive and not mandatory. The use of a permissive administrative remedy does not toll running of a statute of limitations. *Steel Improvement & Forge Company* v. *United States*, 355 F. 2d 627 (Ct. Cl. 1966); *O'Callahan* v. *United States*, 451 F. 2d 1390 (Ct. Cl. 1971). Recourse to the Department of Labor is not mandatory under the ADEA except to give the required notice of intent to sue. An aggrieved employee does not have to file a complaint with the Department. An employee who wants to file his own civil action only has to notify the Department that he intends to bring such an action. There is a mandatory sixty day waiting period in which the Secretary is supposed to mediate, but this alone does not appear to make the administrative remedy mandatory. Further, the aggrieved party is not bound by the result of any settlement achieved by the Secretary in such mediation. If not satisfied the employee may sue if the required notice of intent to sue is accomplished.

It is a well settled general rule that in a given situation a statute of limitations will be tolled if the Congressional

purpose which motivated the involved legislation will thereby be effectuated. *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U.S. 356, 88 L. Ed. 96, 64 S Ct 128 (1943); *Burnett* v. *New York Cent. R. Co.*, 380 U.S. 424, 13 L Ed 2d 941, 85 S Ct 1050 (1965); *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538, 38 L Ed 2d 713, 94 S Ct 756 (1974). In *Burnett* the Court stated:

> ". . . the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances.
>
> In order to determine congressional intent, we must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act."

The Congressional purposes underlying the limitations period provided by 29 U.S.C. §626(d) have been previously considered. That policy as discussed in *Powell* v. *Southwestern Bell Telephone Company*, *supra*, was to make potential defendants aware of their status and the possibility of litigation reasonably soon after the alleged discrimination. This would promote the good faith negotiation of employers during the 60 day conciliation period provided by 29 U.S.C. §626(d). It also provides the opportunity for preservation of evidence and records for use at a trial necessitated by a failure of negotiation. It has been seen from the history of the ADEA that Congress considered the notice provisions to be important. The policies underlying the ADEA are set out in the first section of the Act, 29 U.S.C. §621. That section reads in part, as follows:

> "It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."

The remedial scheme of the Act is basically two fold. An individual employee may enforce the rights created by the Act through an individual action or the Secretary may bring an action on behalf of employees. The Act encourages settlement of differences through the use of state remedies or conciliation through the offices of the Secretary.

In considering the factors delineated in *Burnett*, it is the conclusion of this Court that the purposes of the Act will not be best effectuated through tolling the limitations period herein. Plaintiff relies heavily on *Burnett*. In that case the plaintiff commenced an action under the Federal Employer's Liability Act (FELA) in a state court of competent jurisdiction. The action was dismissed due to venue provisions of the Ohio law. Plaintiff promptly refiled in a Federal District Court of competent jurisdiction. However, between the time of commencing the state action and the Federal action, the statute of limitations provided by the Act had expired. The District Court dismissed the action on the grounds that the statute of limitations had run. The Circuit Court of Appeals affirmed. The Supreme Court reversed.

The Supreme Court held that statutes of limitations are designed to promote fairness to defendants. Such statutes promote justice by preventing surprises through the assertion of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The Court noted that in the case before it the petitioner did not sleep on his rights but filed a timely action in a court of competent jurisdiction. Service of process was had on the defendant notifying it that the petitioner was asserting his rights by suit. Venue was improper under Ohio law but the defendant ,could have waived venue. The court held that the defendant could not rely on the policy of repose since it was aware that the plaintiff

was asserting its rights by suit. Thus, the Court held that the statute of limitations was tolled by the filing of the state court action.

Congress has written into the ADEA an 180 day notice requirement designed to give potential defendants prompt awareness of their status. The traditional policy reason behind a statute of limitations mentioned in Burnett, the promotion of justice by preventing surprise through the assertion of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared, may not have full effect in such a short period of time. Congress nevertheless deemed quick notice to potential defendants to be essential to its new statutory scheme to alleviate the problems of age discrimination in employment. If in creating a new right Congress deems speedy notice essential, as it obviously did in the case of the ADEA, the courts ought not to void the notice requirement for any less compelling reason than would justify the tolling of a statute of limitations. The fact that the plaintiff commenced action in a court of competent jurisdiction and served defendant with timely notice was central to the *Burnett* decision. There was no such comparable action herein by which Defendant was notified of an action against it. The rationale of *Burnett* is therefore inapplicable to this case.

Plaintiff suggests that the policy of the ADEA is humanitarian and remedial, hence timely notice should be waived in this case. It is also the policy of the Act to give potential employers prompt notice of their status as potential defendants. In this context where Plaintiff did not take any action which would justify the tolling of a statute of limitations in a parallel situation, the above policies of the Act are evently balanced and one does not outweigh the other. In such situation the intent of Congress should be fully applied. Plaintiff was not prevented from

asserting her rights by the failure of an employee of the Department of Labor to inform her of them. There is no such duty imposed by the ADEA, nor is one mentioned in the relevant CFR. Plaintiff is assumed to know the law and was possessed of more than enough information to put a reasonable person on inquiry. In this case there are no facts which justify the tolling of the 180 day limitations period. This is not to say that Plaintiff's rights are completely lost. There appears to be yet a possibility that the Department of Labor will undertake and obtain successful action on her part. Her dependence on these Departmental efforts appears to be just in this case as she elected to put her case in its hands and rely on it and not inquire into and pursue her own rights.

Plaintiff contends that she should be allowed to maintain this action as a class action under the "private attorney general" doctrine even if she is found not to have standing to sue on her own behalf. It is her position that she can maintain this action on behalf of similarly situated employees of Defendant even if she is precluded from recovery. Plaintiff relies on *Jenkins* v. *United Gas Corporation*, 400 F. 2d 28 (Fifth Cir. 1968); *Bowe* v. *Colgate-Palmolive Company*, 416 F.2d 711 (Seventh Cir. 1969); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 (Eighth Cir. 1970) and *Hutchings* v. *United States Industries, Inc.*, 428 F. 2d 303 (Fifth Cir. 1970) in support of this proposition. Each of these cases appears to be distinguishable from the case at hand in that the involved plaintiffs had, at least initially, standing to sue. Herein Plaintiff does not even have initial standing to sue.

Moreover, in *O'Shea* v. *Littleton*, 414 U.S. 488, 38 L. Ed. 2d 674, 94 S Ct 669 (1974) the Court stated:

> ". . . if none of the named Plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class . . ."

Article 3 §2 of the Constitution requires that the judicial power of the United States may not be exercised unless there is an actual case or controversy before it. In order for there to be a case or controversy a plaintiff must have a personal stake in the outcome of a controversy. *Baker* v. *Carr*, 369 U.S. 186, 7 L. Ed. 2d 663, 82 S Ct 691 (1962); *O'Shea* v. *Littleson, supra*. It has been previously determined that Plaintiff herein has no standing to sue. She could not gain any recovery through the prosecution of a class action against Defendant. She has failed to satisfy a jurisdictional prerequisite to recovery on her own behalf. Therefore, she does not have a personal stake in the outcome of a class action based on alleged policies of age discrimination perpetrated by Defendant. Thus, Plaintiff does not have a case or controversy with Defendant and cannot bring a class action on behalf of others.

Accordingly, Defendant's Motion to Dismiss should be sustained and Plaintiff's action dismissed for lack of subject matter jurisdiction in this Court.

It is so ordered this 6th day of February, 1975.

/s/ Fred Daugherty
United States District Judge

EXHIBIT B

[Filed July 22 — 1976 Howard K. Phillips Clerk,
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT]

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 75-1277
(74-C-221)

ANNE M. DARTT,
Plaintiff-Appellant,

v.

SHELL OIL COMPANY,
Defendant-Appellee.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Jefferson G. Greer of Greer and Greer on the brief for Appellant.

Mary T. Matthies of Kothe, Nichols & Wolfe, for Appellee.

Jacob I. Karro (William J. Kilberg, Solicitor of Labor; Carin Ann Clauss, Associate Solicitor; Sylvia S. Ellison, Paul D. Brenner; and Ronald M. Gaswirth, Regional Solicitor, of counsel, on the brief) for The Secretary of Labor as Amicus Curiae.

Before LEWIS, Chief Judge; BREITENSTEIN and BARRETT, Circuit Judges.

LEWIS, Chief Judge.

Mrs. Anne M. Dartt sued the defendant Shell Oil Company alleging violations of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, and the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* The trial court dismissed Dartt's action for lack of subject matter jurisdiction because of Dartt's failure to file her notice of intent to sue within the 180-day period as required under 29 U.S.C. § 626(d)(1).[1]

Dartt had been employed at Shell's Credit Card Center in Tulsa, Oklahoma, from January 3, 1966, to July 31, 1973, at which time she was discharged. Ostensibly, Dartt was terminated by Shell because a reorganization of the credit card department had left her without any work. Dartt, who was fifty-one years of age at the time of her termination, believed that her discharge was prompted because of her age and therefore contacted an attorney. She was told by this attorney that it was unnecessary to have an attorney and that she should instead contact the Federal Wage and Hour Division. Pursuant to this advice, on August 9, 1973, Dartt met with J. Dean Speer, the Assistant Area Director of the Department of Labor's Wage and Hour Division in Tulsa. Mr. Speer interviewed Dartt, filled out the Department's complaint form, and instructed Dartt that he would investigate. When asked how long the investigation would take, Speer responded that it might take a year.

Believing that he had a good working relationship

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[1] Section 626(d) provides in part:

No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed —

(1) within one hundred and eighty days after the alleged unlawful practice occurred . . . .

with Shell, Speer immediately following Dartt's visit to his office in an attempt to conciliate Dartt's complaint. Speer met several times with Shell's manager of employee relations, but concluded that his conciliation efforts with Shell were unsuccessful and moved into what he termed "an investigative posture." At this time Shell agreed to make internal studies and to prepare statistical information on its hiring and promotion practices as requested by Speer in his investigation of Dartt's complaint.

Finally, after not having received the requested information from Shell, Speer notified Dartt by letter dated March 5, 1974, that there would be some delay in completing the investigation. In this letter Speer discussed her private right to sue, enclosed a pamphlet detailing the provisions of the ADEA, and directed Dartt's attention to the time limitations for filing one's own lawsuit. Dartt testified that the letter and pamphlet constituted her first actual notice of her right to bring a private action and the 180-day notice requirement. She immediately retained private counsel who on March 14, 1974, mailed a letter to the Tulsa office of the Department of Labor giving notice of Dartt's intention to file a private lawsuit against Shell for violation of the ADEA.

After receiving this notice, Speer attempted to "reconciliate" Dartt's complaint, again without success. Speer notified Dartt's attorney on May 16, 1974, that the Department's efforts had proved unsuccessful and that she was free to take whatever action she wished. The present lawsuit was filed as a class action on May 21, 1974.

Dartt advances essentially two arguments on appeal: (1) While admitting that filing a notice of intent to sue is a prerequisite of a private civil action under the ADEA, Dartt contends that the 180-day period for doing so is not jurisdictional in the sense that it can never be extended and

asserts that this is a proper case for such extension; and (2) Even if the 180-day period is not subject to equitable modifications, Dartt's initial complaint to the Wage and Hour Division was adequate to satisfy the requirement of filing a notice of intent to sue. Dartt's latter argument is supported by the Department of Labor in its *amicus curiae* brief.

At the start we reject Dartt's second argument. Section 626(d) specifically requires a "notice of an intent to file" a private civil action. To hold that a complaint to the Labor Department of an alleged discriminatory employment practice complies with this requirement, even though the complaint never mentions an intent to file a private civil action under the ADEA, would be in complete disregard of the language of the Act. Powell v. Southwestern Bell Telephone Co., 5 Cir., 494 F2 485, 489.

The remaining issue in this case is whether the filing of a notice of intent to sue within the 180-day period provided for in section 626(d)(1) is jurisdictional in the traditional sense that failure to comply is an absolute bar to bringing an action or whether the time limitation is more analogous to statutes of limitation and subject to equitable modifications. Admittedly, ample authority supports the trial court's conclusion that compliance with section 626(d)(1) is a "jurisdictional prerequisite" to any private action under the ADEA.[2] However, after examining

[2]Ott v. Midland-Ross Corp., 6 Cir., 523 F, 1367; Hiscott v. General Elec. Co., 6 Cir., 521 F, 632; Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 5 Cir., 515 F, 1195; Powell v. Southwestern Bell Tel. Co., 5 Cir., 494 F, 485; Raynor v. Great Atl. & Pac. Tea Co., E.D. Va., 400 F. Supp. 357; Vaughn v. Chrysler Corp., E.D. Mich., 382 F. Supp. 143; Oshiro v. Pan Am. World Airways, Inc., D. Hawaii, 378 F. Supp. 80; Cochran v. Ortho Pharmaceutical Co., E.D. La., 376 F. Supp. 302; Burgett v. Cudahy Co., D. Kan., 361 F. Supp. 617; Gebhard v. GAF Corp., D. D.C., 59 F.R.D. 504.

the cases and the legislative history, we remain unconvinced that Congress intended the failure to file notice within the 180-day notice period to be an absolute bar to bringing an ADEA private action.

Because of the similarities between the ADEA and Title VII of the Civil Rights Act of 1964, courts sometimes refer to interpretations of provisions in Title VII for assistance in defining analogous sections of the ADEA. Moses v. Falstaff Brewing Corp., 8 Cir., 525 F_2 92, 94; Curry v. Continental Airlines, 9 Cir., 513 F_2 691, 693; Goger v. H.K. Porter Co., 3 Cir., 492 F_2 13, 15. Title VII requires the complainant to file a charge of alleged unlawful employment practices with the Equal Employment Opportunities Commission (EEOC) within 180 days of the alleged discrimination. 42 U.S.C. §2000e-5(e). Faced with the issue of whether this Title VII time period was jurisdictional or more like a statute of limitations, the Fifth Circuit held:

> The *ratio decidendi*, however, of the leading cases dealing with timing requirements in general under the Act compels the conclusion that the ninety day requirement [amended in 1972 to 180 days] is not "jurisdictional" in the sense that compliance with it *vel non* determines the jurisdiction of the district court, without respect to any of the other circumstances in a particular case. We accept the view that the requirement should be analogized to statutes of limitations. Equitable modifications, such as tolling and estoppel, that are applied to them should also be applied here.

Reeb v. Economic Opportunity Atlanta, Inc., 5 Cir., 516 F_2 924, 928. *Reeb* is not alone in allowing equitable considerations to toll the time limitations established by Title VII. *See, e.g.*, Culpepper v. Reynolds Metals Co., 5 Cir., 421 F_2 888, 891, Antonopulos v. Aerojet-General Corp., E.D. Cal., 295 F. Supp. 1390, 1395. The *Reeb* court's

holding that the notice period was not jurisdictional in the strict sense was based on the arguments that: (1) Since the complainants under the Act would most likely be laymen, they should not be held to "the technical rules of common law pleading" in filing their charges; (2) Title VII was remedial legislation and therefore entitled to a liberal construction; and (3) Many of the cases calling the time limitation "jurisdictional" were suffering from a "conceptual confusion" since having labeled the requirement jurisdictional they proceeded to toll the time limitation for equitable reasons.

This court has also determined that under certain conditions the 180-day period for filing charges with the EEOC may be tolled. Sanchez v. Trans World Airlines, Inc., 10 Cir., 499 F_2 1107, 1108. *See also* Archuleta v. Duffy's Inc., 10 Cir., 471 F_2 33 & n.1 (where this court referred to the time limitation for filing a civil action after receiving a right-to-sue notice from the EEOC as a "statute of limitations").

Many of the arguments advanced for tolling Title VII time limitations are applicable to the time limitations in the ADEA. In a recent case discussing section 626(d)(1) time limitations, a court observed that the confusing use of the term "jurisdictional" in some Title VII cases was also occurring in ADEA cases: "Many courts have labeled the filing requirements 'jurisdictional' but have treated them as analogous to statutes of limitations and subject to equitable modifications." Skoglund v. Singer Co., D. N.H., 403 F. Supp. 797, 804. For example, a recent Fifth Circuit case held that section 626(d)(1) prerequisites were jurisdictional, but proceeded to outline several instances where the 180-day notice period might be tolled. Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 5 Cir., 515 F_2 1195, 1198. In dictum, the court suggested that the period

might be tolled until an aggrieved employee obtained legal counsel or acquired an actual knowledge of his rights under the ADEA. The court concluded, however, that it need not determine whether tolling was allowable because the plaintiff in that case had failed "to file notice within 180 days of securing counsel or within 180 days of actual knowledge." *Id.* Thus, it appears that even though the Fifth Circuit was the first court of appeals to label section 626(d)(1) requirements as jurisdictional, *Powell, supra,* it has left the door open for possible equitable modification of the 180-day notice period. This conclusion is further supported by the Fifth Circuit's determination that the analogous time limitation in Title VII was not jurisdictional, but subject to modifications. *Reeb, supra.*

Other cases dealing with the ADEA time limitations have also confusingly used the label "jurisdictional" while allowing a liberal interpretation of ADEA requirements. *See, Moses, supra;* Burgett v. Cudahy Co., D. Kan., 361 F. Supp. 617. These conceptual difficulties appear to be caused by an overly broad usage of the term "jurisdictional."

Other arguments support a determination that section 626(d)(1)'s time limitation should be treated as analogous to a statute of limitations. The ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment. *Moses, supra* at 93; *Skoglung, supra* at 801. Additionally, strict compliance with section 626(d)(1)'s time limitation should not be required of laymen attempting to enforce their statutory rights. *Skoglund, supra* at 801; Woodford v. Kinney Shoe Corp., N.D. Ga., 369 F. Supp. 911, 915. *See also* Love v. Pullman Co., 404 U.S. 522, 527; *Reeb, supra* at 928.

We do not contend that a filing of a notice of intent

to sue is not a condition precedent to an action under the ADEA. However, the similarities between Title VII and the ADEA, the liberal reading of analogous time limitations in Title VII, the overly broad usage of the term "jurisdictional" by courts interpreting section 626(d) of the ADEA, the remedial nature of the legislation, and the lack of legal training and guidance for many of the ADEA complainants lead us to conclude that while section 626(d)(1)'s notice of intent-to-sue requirement cannot be waived, the 180-day time limitation should be interpreted as being subject to possible tolling and estoppel.[3] *See Moses, supra; Scoglund, supra; Woodford, supra;* and Bishop v. Jelleff Associates, D. D.C., 398 F. Supp. 579.

Left for consideration is the determination of whether the circumstances surrounding Dartt's complaint contain equitable factors warranting a tolling of the 180-day notice period. Placing emphasis upon Dartt's presumptive knowledge of the law and constructive notice from Shell's posted notices, discussed *infra,* note 5, the trial court held that Dartt was entitled to no equitable relief by way of tolling. We do not agree. Initially, Mrs. Dartt consulted an attorney who told her to take her complaint to the Labor Depart-

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[3]This conclusion is not inapposite to our recent holding in Law v. United Air Lines, Inc., 10 Cir., 519 F. 170. In *Law,* we found that filing of the notice was a "precedent" to a private action. In support of said proposition, we stated that we were "in accord with *Powell*." *Id.* at 171. Tolling was not an issue in *Law* since the notice was filed more than 5 years after the alleged discriminatory act. Also, as we noted in our discussion of *Edwards, supra,* the Fifth Circuit did not intend to "close the door" on possible equitable modifications of section 626(d)(1)'s time limitations by its *Powell* decision. The Fifth Circuit itself noted that it was partially rejecting the plaintiff's tolling theory because the plaintiff "was expressly alerted to the time limitations for possible action, both private and agency assisted." *Powell, supra* at 490. The court in Powell simply was not faced with a situation where the equities dictated a tolling. Neither were we in *Law.*

ment's local Wage and Hour Division office.[4] Dartt promptly did so and was told by Mr. Speer, Assistant Area Director, that it might take up to a year before the investigation was concluded. Anxious to check on the progress of her case, Mrs. Dartt testified that after her initial interview with Mr. Speer, she telephoned Speer at least once a month. It was not until after the 180-day period had run that Dartt was informed that in order to bring a private lawsuit against Shell she would have to file notice of intent to sue within 180 days of the alleged discriminatory act. Immediately Dartt retained another attorney who promptly filed the requisite notice of intent to sue, even though it was 36 days beyond the statutory time period.

An important factor in determining whether to exercise this court's equitable powers to toll section 626(d)(1)'s time limitation is whether to do so would be in keeping with the congressional purpose of the ADEA. The two basic purposes behind the 180-day notice requirement are (1) To provide the Labor Department with an opportunity

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[4]Dartt testified that when she telephoned an attorney to discuss Shell's possible infringement of the ADEA, the attorney responded: "You don't need an attorney. You need to go to the Federal Wage and Hour Department." Had Dartt's contact been more than a preliminary approach as to possible consultation, we might possibly be led to the conclusion reached in *Edwards, supra,* where the court noted that it would be:

> [A] singularly inappropriate situation for such a remedy, in view of the fact that Edwards consulted an attorney long before the 180 day period ran. In such a circumstance, he had the "means of knowledge" of his ADEA rights, for the very purpose of consulting an attorney is to ascertain what legal redress arises out of a factual situation encompassing a supposed wrong. While it may be inequitable to allow an employer to benefit from his own wrong, it would be at least equally unfair to then hold that the employer is estopped from raising the 180 day bar where the injured employee consulted an attorney who either slept on his client's rights or did not believe he had any under the statute.

Id. at 1200 n.8.

to achieve a conciliation of the complaint while the complaint is still fresh, and (2) to give early notice to the employer of a possible lawsuit, the latter promoting both the preservation of evidence and good faith negotiating on the part of the employer during the conciliation period. *Moses, supra* at 94; *Powell, supra* at 488. From the record it appears that both of these purposes were fulfilled in spite of Dartt's tardy filing of the notice of intent to sue. Shell received early notification of Dartt's allegations; a Shell representative was contacted by telephone the same day that Dartt registered her allegations with the Labor Department. Also, the Labor Department attempted to conciliate Dartt's complaint following her initial complaint and well before receiving her notice of intent to sue.

There are other facts which tend to support an equitable extension of the 180-day notice period. For example, even though not required to do so by statute, it was the customary practice of Mr. Speer to advise every complainant of the 180-day notice of intent-to-sue requirement, which he did not do in this instance. Furthermore, Speer testified that he was awaiting certain statistical information which Shell had agreed to provide him before sending Mrs. Dartt the letter of March 5 which notified her of her right to bring a private suit under ADEA and the requirement of filing a notice of intent to sue within 180 days of the discriminatory act. In an indirect manner, therefore, Shell's failure to provide the agreed upon information to the Wage and Hour Division contributed to Speer's failure to notify Dartt of her right to sue prior to the running of the 180-day period. Finally, even though Congress inserted a requirement that employers must post such information pertaining to the ADEA "as the Secretary [of Labor] deems appropriate to effectuate the purposes of [the Act]," 29 U.S.C. §627, such notice posted by Shell, even though

provided by the Wage and Hour Division, was completely inadequate to inform Dartt as to the 180-day notice requirement.[5]

We cannot fault Dartt in her efforts to present her cause. She twice promptly sought private legal advice and twice promptly followed that advice. Short of anticipating an administrative dereliction by the Wage and Hour Division, despite her prodding of that agency, it was not to be expected that lapse of time would void her cause. This is not a case of a plaintiff sleeping on her rights nor a defendant in any way being prejudiced thereby either presumptively or in fact. In light of these circumstances and the *de facto* fulfillment of the main purposes of the Act, we hold that the time limitation was tolled until the filing of Dartt's notice of intent to sue.

Reversed and remanded for further proceedings consistent with this decision.

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[5]The printed notice which was furnished to Shell by the Department of Labor noted that the ADEA was applicable to persons age 40 to 65, listed the employers who were subject to the Act, and stated:

> If you feel you have been discriminated against in matters of hiring, discharge, compensation, or other phases of employment because of your age, contact the:
>
> U.S. Department of Labor
> Wage and Hour Division

Without discussing whether the notice adequately complied with Congress' language that the notice set forth "information as the Secretary deems appropriate to effectuate the purposes of" the ADEA, 29 U.S.C. §627, we could not in good conscience hold Dartt to strict compliance of the 180-day notice period by constructive notice of this posting.

EXHIBIT C

JULY TERM — August 19, 1976

Before The Honorable David T. Lewis, Chief Judge,
The Honorable Jean S. Breitenstein, Senior Judge,
The Honorable Delmas C. Hill,
The Honorable Oliver Seth,
The Honorable William J. Holloway, Jr.,
The Honorable Robert H. McWilliams,
The Honorable James E. Barrett and
The Honorable William E. Doyle, Circuit Judges

No. 75-1277

ANNE M. DARTT,
Plaintiff-Appellant,

vs.

SHELL OIL COMPANY,
Defendant-Appellee.

DEPARTMENT OF LABOR,
Amicus Curiae.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Chief Judge Lewis, Senior Circuit Judge Breitenstein and Circuit Judge Barrett to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of

Appellate Procedure, the suggestion for rehearing en banc is denied.

/S/ HOWARD K. PHILLIPS
Clerk

/S/ LINDA A. HALL
Deputy Clerk

EXHIBIT D

§626. Recordkeeping, investigation, and enforcement

Attendance of witnesses; investigations, inspections, records, and homework regulations

(a) The Secretary shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall

attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary

(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

Same; notice to Secretary: timeliness; conciliation, conference, and persuasion

(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed —

(1) within one hundred and eighty days after the alleged unlawful practice occurred, or

(2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

Statute of limitations; reliance in future on administrative rulings, etc.

(e) Sections 255 and 259 of this title shall apply to actions under this chapter.

SET FORTH BELOW IS THE TEXT OF 29 U.S.C. §216, WHICH IS INCORPORATED BY REFERENCE IN 29 U.S.C. §626(b)

§216. Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary of Labor; limitation of actions; savings provision

(a) Any person who wilfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded

to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection.

(c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such

employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) In any action or proceedings commenced prior to, on, or after Aug. 8, 1956, no employer shall be subject to any liability or punishment under this Act or the Portal-to-Portal Act of 1947 on account of his failure to comply with any provision or provisions of such Acts (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 206(a) (3) of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e) Any person who violates the provisions of section 212 of this title, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty, when finally determined, may be —

(1) deducted from any sums owing by the United States to the person charged;

(2) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

(3) ordered by the court, in an action brought for a violation of section 215(a) (4) of this title, to be paid to the Secretary.

Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of Title 5 and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalities, in accordance with the provisions of section 9a of this title.

SET FORTH BELOW IS THE TEXT OF 29 U.S.C. §255, WHICH IS INCORPORATED BY REFERENCE IN 29 U.S.C. §626(e)

§255. Statute of limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act —

(a) if the cause of action accrues on or after May 14, 1947 — may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

(b) if the cause of action accrued prior to May 14, 1947 — may be commenced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations; and, except as provided in paragraph (c) of this section, every such action shall be forever barred unless commenced within the shorter of such two periods;

(c) if the cause of action accrued prior to May 14, 1947, the action shall not be barred by paragraph (b) of this section if it is commenced within one hundred and twenty days after May 14, 1947 unless at the time commenced it is barred by an applicable State statute of limitations;

(d) with respect to any cause of action brought under section 216(b) of this title against a State or a political subdividion of a State in a district court of the United States on or before April 18, 1973, the running of the statutory periods of limitation shall be deemed suspended during the period beginning with the commencement of any such action and ending one hundred and eighty days after the effective date of the Fair Labor Standards Amendments of 1974, except that such suspension shall not be applicable if in such action judgment has been entered for the defendant on the grounds other than State immunity from Federal jurisdiction.

SET FORTH BELOW IS THE TEXT OF 29 U.S.C. §259, WHICH IS INCORPORATED BY REFERENCE IN 29 U.S.C. §626(e)

§259. Reliance in future on administrative rulings, etc.

(a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or

enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) of this section shall be —

(1) in the case of the Fair Labor Standards Act of 1938, as amended — the Administrator of the Wage and Hour Division of the Department of Labor;

(2) in the case of the Walsh-Healey Act — the Secretary of Labor, or any Federal officer utilized by him in the administration of such Act; and

(3) in the case of the Bacon-Davis Act — the Secretary of Labor.

EXHIBIT E

STATE OF OKLAHOMA }
COUNTY OF TULSA } SS.

AFFIDAVIT

I, KENNETH JACOBS, of lawful age, being first duly sworn upon oath, depose and say:

That I am the Manager of Employee Relations for the Shell Oil Company Credit Card Center, located at 6502 South Yale, Tulsa, Oklahoma.

During my employment in that capacity, I had occasion to participate in several discussions with J. Dean Speer, Assistant Area Director of the local Wage and Hour Division office, regarding the discharge of Anne M. Dartt.

My first meeting with Mr. Speer regarding the Dartt case was on August 24, 1973. According to Mr. Speer, the purpose of that meeting was to advise Shell Oil Company of the charge by Ms. Dartt and to attempt to discover what the facts were in the case. Mr. Speer told us briefly what Ms. Dartt's allegations were, and I, in turn, advised Mr. Speer that Shell's reason for Ms. Dartt's termination was her poor work performance.

Mr. Speer then asked for some data on performance appraisals for Ms. Dartt and other persons in her job classification, which I subsequently mailed to him on September 4, 1973. During our meeting, Mr. Speer never stated that he was "conciliating" the Dartt charge. Instead, he gave me every indication he was pursuing an ordinary investigation.

Our next meeting was on October 31, 1973. At that time, Mr Speer informed me that he had conducted interviews with several employees in his investigation of the Dartt charge, and that he felt that he had, in essence, a

prima facie case against Shell. He then proceeded to outline the various aspects which he believed would create a *prima facie* case in the Dartt charge. At that time, he asked whether we wanted an opportunity to present evidence in support of our position that no discrimination had occurred, or whether we were interested in settlement. I informed him that I would have to get back to him later as to the position of Shell on either exploring settlement or proceeding with the investigation.

On November 27, 1973, I wrote to Mr. Speer and advised him that we would proceed to compile certain data which he had indicated he would need if we decided not to explore settlement. The studies which Mr. Speer had requested were quite voluminous, and Mr. Speer was aware that it would take several months to complete the compilation of the requested data.

On February 25, 1974, I talked with Mr. Speer and advised him that we are making progress on the compilations and would complete them as soon as possible. Then, on March 18, 1974, Shell received a copy of the Notice of Intent to Sue filed by Ms. Dartt. Shortly thereafter, I met with Mr. Speer, who advised me that he no longer needed the compilations, inasmuch as Ms. Dartt was pursuing a private cause of action. At this same meeting, Mr. Speer advised me that he was no longer acting as an investigator with respect to the charge, but was there solely as a "mediator." He stated that it made no difference to him as to who was right in the dispute, and that anything the parties could agree on was fine with him.

The attitude of Mr. Speer was wholly different in this meeting than in our meeting of October 31, 1973. In the October meeting, Speer had stated that any settlement of the case would need to be acceptable to the Department of Labor and to Ms. Dartt. In the meeting mentioned

above, he appeared to be disinterested in how the case was settled. Furthermore, in the October, 1973 meeting, Mr. Speer merely offered Shell the opportunity to explore settlement of the charge, whereas, in the last meeting, Speer appeared to be actively interested in bringing the parties together without any control by Speer over the terms of the settlement.

I requested that Mr. Speer determine what Ms. Dartt was interested in as a settlement of the case. Mr. Speer telephoned me the next day, April 5, 1974, to inform me of Ms. Dartt's initial demands. I told Mr. Speer that Shell would discuss her offer, and decide whether it would make a counteroffer. Mr. Speer actively encouraged me to consider her offer, and stated he would present any counteroffer to Ms. Dartt.

We later determined that, for a variety of reasons, conciliation should not proceed, and so informed Mr. Speer. Shortly thereafter, the lawsuit by Ms. Dartt was filed.

I have read the above and foregoing statement, consisting of four (4) pages, and it is true and correct to the best of my knowledge and belief.

/s/ KENNETH JACOBS

Subscribed and sworn to before me this 28th day of August, 1975.

/s/ NOTARY PUBLIC

My commission expires:
June 17, 1978

EXHIBIT F

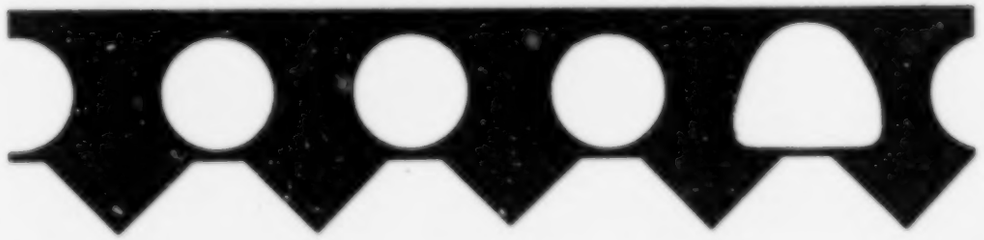
EQUAL EMPLOYMENT OPPORTUNITY IS THE LAW

LA LEY EXIGE IGUALDAD DE OPORTUNIDAD PARA TODOS EN EL EMPLEO

Discrimination Is Prohibited

by Title VII of the Civil Rights Act of 1964 and by Executive Orders 11246 and 11375

El Título VII de La Ley de Derechos Civiles de 1964 prohibe la discriminación en el empleo.



FEDERAL LAW PROHIBITS job discrimination because of RACE, COLOR, RELIGION, SEX or NATIONAL ORIGIN.

This protects employees of private employers, la- ...ajies, employment agencies, state and local governments, and educational institutions. ANY PERSON who believes he or she has been discriminated against should contact immediately

THE U S EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
1800 G Street, NW
Washington, D C 20506

or

any EEOC District Office listed in your local telephone directory under U S Government.

Executive Order Number 11246, issued by the President, prohibits job discrimination because of RACE, COLOR, RELIGION, SEX or NATIONAL ORIGIN, and requires affirmative action to ensure equality of opportunity in all aspects of employment.

This protects employees of any company with a contract or a subcontract with the Federal Government. ANY PERSON who believes he or she has been discriminated against should contact

THE OFFICE OF
FEDERAL CONTRACT COMPLIANCE
U S Department of Labor
Washington, D C 20210

LA LEY FEDERAL PROHIBE discriminación en el empleo por motivos de su RAZA, COLOR, RELIGION, SEXO, u ORIGEN NACIONAL.

La ley protege empleados de compañías privadas, sindicatos de trabajadores (unions), agencias de empleo, escuelas e instituciones de educación, y para gobiernos de los estados o municipios y sus agencias. CUALQUIER PERSONA que crea que sus derechos han sido violados debe de escribir al

THE U S EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
1800 G Street, NW
Washington, D C 20506

o

cualquier oficina de distrito del EEOC. Consulte la guía local de teléfono debajo de "United States Government."

La orden ejecutiva Numero 11246, del Presidente, prohibe la discriminación en el empleo por motivos de su RAZA, COLOR, RELIGION, SEXO, u ORIGEN NACIONAL y exige que ciertas patronos tomen acción positiva para garantizar igualdad de oportunidad en todos los aspectos del empleo.

Esta orden protege a los empleados de cualquier compañía o a aquellos que trabajan para un patron que tenga un contrato o subcontrato con el gobierno Federal. CUALQUIER PERSONA que crea que un contratista o subcontratista debe escribir a

THE OFFICE OF
FEDERAL CONTRACT COMPLIANCE
U S Department of Labor
Washington, D C 20210

EXHIBIT G

REMEMBER . . .

The official Notice to Employees must be posted where employees can readily see it.
Records must be kept.
If you have any questions concerning the Federal Minimum Wage Law, contact the nearest office of the UNITED STATES DEPARTMENT OF LABOR, Wage and Hour Division

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This official NOTICE TO EMPLOYEES is being sent to employers generally. The fact that you have received a copy does not mean that it has been determined that your employees are subject to the Act's minimum wage and overtime provisions. If you have any question about how the law applies, contact the nearest Wage and Hour office.

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Washington, D.C. 20210

OFFICIAL BUSINESS
Penalty for Private Use, $300

Postage and Fees Paid
U.S. DEPARTMENT OF LABOR
LAB 701

THIRD CLASS

Address Correction Requested
Return Postage Guaranteed

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Wage and Hour Division
Washington, D.C. 20210

NOTICE TO EMPLOYEES:

Beginning May 1, 1974 THE FAIR LABOR STANDARDS ACT AS AMENDED (THE FEDERAL MINIMUM WAGE LAW) REQUIRES:

A MINIMUM WAGE OF AT LEAST

$2.00 an hour

$2.10 an hour, beginning January 1, 1975
$2.30 an hour, beginning January 1, 1976

This minimum wage must be paid to non-agricultural employees who are engaged in or are producing goods for interstate commerce, or who are employed in certain large enterprises brought within the coverage of the Fair Labor Standards Act prior to 1966.

AND

OVERTIME PAY AFTER 40 HOURS A WEEK AT NOT LESS THAN ONE AND ONE-HALF THE EMPLOYEE'S REGULAR RATE OF PAY

For employees in enterprises brought within the coverage of the Fair Labor Standards Act in 1966, 1972, or 1974, THE LAW REQUIRES: Beginning May 1, 1974—

A MINIMUM WAGE OF AT LEAST

$1.90 an hour

$2.00 an hour, beginning January 1, 1975
$2.20 an hour, beginning January 1, 1976
$2.30 an hour, beginning January 1, 1977

Employees entitled to this minimum wage are employed by each establishments and enterprises as preschools, schools and colleges; hospitals and other health care institutions; laundries; small construction firms; large hotels, motels and restaurants; motion picture theaters; state and local government agencies; private households; and other small establishments.

AND

OVERTIME PAY AFTER 40 HOURS A WEEK AT NOT LESS THAN ONE AND ONE-HALF TIMES THE EMPLOYEE'S REGULAR RATE OF PAY.

There are specific exemptions from the minimum wage and overtime pay provisions of the Fair Labor Standards Act, or from its overtime provisions only, as to specified employees employed by certain establishments and in named occupations. The Act also provides for a lower minimum for agriculture, has provisions prohibiting oppressive child labor, and requires equal pay for equal work regardless of sex.

The Act prohibits discharging or discriminating against an employee because he has filed a complaint or participated in a proceeding under the Act.

MORE INFORMATION IS AVAILABLE AT WAGE-HOUR OFFICES LOCATED IN 350 COMMUNITIES THROUGHOUT THE COUNTRY. CONSULT YOUR TELEPHONE DIRECTORY UNDER U.S. GOVERNMENT, DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION OR WRITE:

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Wage and Hour Division
Washington, D.C. 20210

U.S. LABOR DEPARTMENT
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

HIGHLIGHTS OF THE FAIR LABOR STANDARDS ACT AMENDMENTS OF 1974

(Effective May 1, 1974)

These Highlights discuss the Act's provisions which have been affected by the 1974 Amendments. They are for general information and are not to be considered in the same light as official statements of position contained in Interpretative Bulletins and other such releases formally adopted by the Wage and Hour Division and published in the Federal Register.

HIGHLIGHTS OF THE
Fair Labor Standards Act Amendments of 1974

The Fair Labor Standards Act provides different minimum wage and overtime standards for employment subject to the law prior to February 1, 1967 and employment brought under the law after that date.

Provisions applicable to employment covered prior to February 1, 1967

AT LEAST

$2.00 an hour, beginning May 1, 1974
$2.10 an hour, beginning January 1, 1975
$2.30 an hour, beginning January 1, 1976

OVERTIME PAY

Not less than 1½ times the employee's regular rate of pay for all hours worked beyond 40 in a workweek.

COVERAGE

The above minimum rates must be paid, except where a specific exemption is provided, to all employees engaged in or producing goods for interstate or foreign commerce, and to all other employees employed in any of the following enterprises engaged in or producing goods for commerce, including work relating to goods that have been moved in or produced for commerce:

(1) Retail or service enterprises having an annual gross volume of sales of at least $1 million* and $250,000 annual inflow of interstate goods;

(2) Local transit enterprises having an annual gross volume of sales of at least $1 million*;

(3) Construction enterprises doing a gross annual business of at least $350,000;

(4) Gasoline service stations having an annual gross volume of sales of at least $250,000*;

(5) Establishments other than the above having individually covered employees, an enterprise having an annual gross volume of at least $1 million.

* Exclusive of excise taxes at the retail level which are stated separately stated.

Provisions applicable on and after May 1, 1974 to employment of employees brought under the Act in 1967 and later.

AT LEAST

$1.90 an hour, beginning May 1, 1974
$2.00 an hour, beginning January 1, 1975
$2.20 an hour, beginning January 1, 1976
$2.30 an hour, beginning January 1, 1977

OVERTIME PAY

Not less than 1½ times the employee's regular rate of pay for all hours worked beyond 40 in a workweek.

The rates shown above have to be paid, except where a specific exemption is provided, to all employees whose employment came under the Act in 1967 and later. Such employees include those brought under the minimum wage or overtime pay provisions by amendments since 1966, either through elimination or narrowing of prior exemptions or as a result of the extension of coverage on an enterprise basis to employees in the following enterprises engaged in or producing goods for commerce, including work relating to materials that have been moved in or produced for commerce:

* (1) Laundry and dry cleaning enterprises;

* (2) Construction enterprises;

* (3) Hospitals, nursing homes, preschool, schools and institutions (both public and private) and Federal, State, Local and interstate governments and agencies;

(4) Other enterprises, if the annual gross volume of sales or business is at least $250,000* (exclusive of excise taxes at the retail level which are stated separately) and in addition,

* (5) Domestic service workers.

* No annual dollar volume test applies.
* Exclusive of any excise taxes at the retail level.

FARM LABOR COVERAGE: Employees employed in agriculture, by an employer who used more than 500 man-days of agricultural labor in any calendar quarter of the preceding calendar year, must be paid a minimum wage of at least $1.60 an hour beginning May 1, 1974; $1.80 an hour beginning January 1, 1975; $2.00 an hour beginning January 1, 1976; $2.20 an hour beginning January 1, 1977; and $2.30 an hour beginning January 1, 1978.

EXEMPTIONS UNDER AMENDED ACT

A minimum wage and overtime pay exemption for employees of small retail or service establishments applies where the establishment is not in a covered enterprise (i.e., an enterprise with $250,000 annual volume). This exemption will be phased out by January 1, 1977, for such chain store establishments and for establishments controlled by a conglomerate. This exemption does not apply to laundries, dry cleaners, health care institutions, or schools. The overtime exemptions for employees of hotels, motels, restaurants, food service operations in retail establishments, and bowling alleys have been revised. The overtime provisions will apply to such employees after a specified number of hours and in some cases, are eventually phased out.

Motion picture theaters with $250,000 annual volume are subject to the $1.90 minimum wage but continue to have an overtime exemption.

The overtime exemption after 48 hours a week for nursing home employees has been deleted. A nursing home may now have an agreement with its employees to pay overtime after 80 hours in a work period, just as hospitals do.

There are special overtime provisions for fire and police personnel, including security personnel in correctional institutions. Domestics who reside in the household where they work are exempt from overtime. Persons performing casual baby sitting services and companions for aged or infirm persons are exempt.

Exemptions for certain agricultural operations and certain agricultural processing occupations have been revised. The overtime exemptions for seasonal industries, and for cotton ginning and processing employees, will be phased out over a two year period. Employees on farms owned or controlled by a conglomerate are subject to the minimum wage but remain exempt from overtime.

Full-time students may be employed on a part-time basis in retail and service establishments, agriculture and institutions of higher education at 85 percent of the applicable minimum wage under special certificates issued by the Wage and Hour Division.

The overtime exemption for local transit operating employees will be phased out. The minimum wage exemption for employees in small logging crews is repealed, but they remain exempt from the overtime.

The Act contains other minimum wage and full or partial overtime exemptions. For information about these exemptions and other provisions of the law, contact the nearest office of the Wage and Hour Division, Employment Standards Administration.

CHILD LABOR

Sixteen years is the minimum age for most employment covered by the Act. There are special child labor provisions for employment in agriculture. Violations of the child labor provisions are subject to fines up to $1,000 for each violation.

ENFORCEMENT

Failure to pay the statutory minimum wage and overtime compensation results in cumulative back wage liabilities. Unpaid wages may be collected under the supervision of the Secretary of Labor or recovered through court action brought by the Secretary or employee. Serious violations of the law may result in civil or criminal action. Records required by the law must be available for inspection by representatives of the Division.

EXHIBIT H

EXHIBIT 1

Persons 40-65 Years Note!

The Age Discrimination in Employment Act prohibits arbitrary age discrimination in employment by

- Private Employers of 20 or more persons
- Federal, State, and Local Governments, without regard to the number of employees in the employing unit (effective May 1, 1974)
- Employment Agencies serving such employers
- Labor Organizations with 25 or more members

Certain exceptions are provided.
If you feel you have been discriminated against because of age, contact the nearest office of the Wage and Hour Division, U.S. Department of Labor. If you wish to file your own suit, you must do so within prescribed time limits. It is important to contact the Division promptly.

Questions on Federal employment should be directed to the U.S. Civil Service Commission, Washington, D.C. 20415.

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

FEB 18 PAGE 2

Supreme Court, U. S.
FILED
JAN 31 1977
MICHAEL RODAK, JR., CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-678

SHELL OIL COMPANY,
Petitioner

v.

ANNE M. DAKTT,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR SHELL OIL COMPANY AS PETITIONER

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SUPPLEMENTAL MEMORANDUM FOR SHELL OIL COMPANY AS PETITIONER

In its Petition for Certiorari, Shell Oil Company did not have the benefit of the recent decision by this Court in *Electrical Workers v. Robbins & Myers, Inc.*, Nos. 75-1264 and 75-1276, decided on December 20, 1976. For the reasons stated herein, Shell Oil Company submits that the decision in *Robbins & Myers* increases the importance

of review of the instant cause by this Court and requires reversal of the decision below.

In the *Robbins & Myers* decision, this Court held that, when Congress specifies that a defendant receive a particular type of notice within an established period of time, it is not within the province of the courts to alter those requirements based upon equitable considerations. As this Court stated in *Robbins & Myers:*

> But the principal answer to this contention is that Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a "slight" delay equally acceptable. In defining Title VII's *jurisdictional prerequisites* "with precision" [citations omitted], Congress did not leave to the courts the decision as to which delays might or might not be "slight." (Emphasis supplied)

This is precisely the issue presented here. The court below held that it had the power to judicially alter a "jurisdictional prerequisite" (the time period for fulfilling the 29 U.S.C. §626(d) notice requirement), based upon equitable considerations. This holding appears to be in conflict with the decision by this Court in *Robbins & Myers,* as well as with decisions by the Fifth, Sixth and Eighth Circuits.[1] As a result, the issue presented by the instant case of whether the lower court could properly excuse timely compliance with a jurisdictional prerequisite is an important question which should be decided by this Court.

In addition, the *Robbins & Myers* decision also supports the contention by Shell Oil Company that mere notice of a claim by a plaintiff, which is not in the form or manner contemplated by the applicable statute, is insuffi-

[1] *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir. 1974); *Eklund v. Lubrizol Corp.*, 529 F.2d 247 (6th Cir. 1976); *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975).

cient to toll the time for compliance with the statutory notice requirements. In *Robbins & Myers,* the plaintiff notified her employer only two days after her discharge that she believed her discharge to be "unfair." However, this Court found that this action by the plaintiff was insufficient to adequately notify her employer that the plaintiff intended to pursue her Title VII cause of action. Based upon this lack of adequate notice to the employer, this Court held that no tolling of the time for filing an EEOC charge would be permissible.

The touchstone of the *Robbins & Myers* decision is, therefore, whether the defendant received adequate, timely notice of the actions which the plaintiff intended to take against it. The Department of Labor contends that a defendant receives adequate notice under 29 U.S.C. §626(d) that a plaintiff intends to sue it by a simple assertion by the plaintiff that she has been a victim of age discrimination. In the view of the Department of Labor, mere identity in the cause of action being asserted is sufficient to bring into play the tolling principles enunciated by this Court in *Burnett v. New York Central R.R. Co.,* 380 U.S. 424 (1965).

Shell Oil Company submits that this reading of *Burnett* is far too restrictive and ignores the statutory procedures established by Congress for enforcement of A.D.E.A. rights. Under the A.D.E.A., there are two distinct remedies available to a plaintiff. One is to bring a private lawsuit, and the other is to file a claim with the Department of Labor and to rely upon its administrative or judicial actions. Every other Circuit ruling on this issue has found that a mere assertion of a claim of age discrimination, without a specific notice to the Department of Labor of an intent to bring a private suit, is insufficient to give an employer the statutorily-required notice that it will be

sued.[2] Because the A.D.E.A. provides two separate and independent remedies, and because Congress has specifically established notice requirements to defendants regarding an intention by a plaintiff to invoke the private litigation remedy, the instant case is closely analogous to the situation presented in *Robbins & Myers*. There, this Court held that pursuit of one legal avenue for the remedy of racial discrimination did not put the defendant on notice that the plaintiff intended to pursue alternate legal remedies, and thus no tolling was permissible. Accord, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36.

Shell Oil Company submits that the reasoning of the district court in this case as to the inapplicability of *Burnett* is persuasive. As the district court stated:

> The fact that the plaintiff commenced action in a court of competent jurisdiction and served defendant with timely notice was central to the *Burnett* decision. There was no comparable action herein by which Defendant was notified of an action against it. The rationale of *Burnett* is therefore inapplicable to this case. (Pet. 13a)

As a result, this case presents the additional important question of whether the *Burnett* tolling principle is inapplicable to situations where the defendant did not receive the notice contemplated by the statute as to the intent by the

[2] *Powell v. Southwestern Bell Telephone Co., supra; Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1975); *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195 (5th Cir. 1975). Indeed, the Tenth Circuit tacitly admitted that such an assertion does not convey the required notice contemplated by the statute when it stated that: "To hold that a complaint to the Labor Department of an alleged discriminatory employment practice complies with this requirement, even though the complaint never mentions an intent to file a private civil action under the ADEA, would be in complete disregard of the language of the Act." (Pet. 19a)

plaintiff to bring suit. In *Burnett*, the defendant was timely and properly given notice of the lawsuit of the plaintiff by service of process made in accordance with the statute. There was no defect in the notice given, but only a defect in venue. Here, it is undisputed that Shell Oil Company never received any timely notice, in the manner contemplated by the statute, that a suit was being brought against it. Therefore, the district court herein properly found that *Burnett* did not apply to the facts of this case, and the Tenth Circuit erroneously reversed that finding.

There is a clearcut conflict between the decision below and that of other Circuits as to the type of notice which must be given to a defendant in order to minimally satisfy the Congressionally-mandated notice requirement set forth in 29 U.S.C. §626(d). This is an important question concerning the interpretation and application of the A.D.E.A. which has not been, but should be, decided by this Court. Therefore, Shell Oil Company submits that this Court must grant certiorari to resolve these issues.

Respectfully submitted,

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Supreme Court, U. S.
FILED
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OCTOBER TERM, 1976

SHELL OIL COMPANY, PETITIONER

v.

ANNE M. DARTT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This submission is made in support of the petition for a writ of certiorari. Although the United States believes that the court of appeals' decision in this case is correct, that decision conflicts with decisions of other courts of appeals on an issue of substantial importance arising under the Age Discrimination in Employment Act of 1967. If the petition is granted, the United States will submit a brief as amicus curiae urging affirmance of the decision below.

INTEREST OF THE UNITED STATES

The United States has an immediate interest in this case because of the responsibilities of the Secretary of Labor under the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. 621 *et seq.* ("ADEA" or "Act"). The purposes of the ADEA are to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. 621(b). To effectuate these purposes, Congress conferred upon the Secretary of Labor a variety of responsibilities. These include responsibility for investigating charges of age discrimination in employment and attempting to eliminate "through informal methods of conciliation, conference, and persuasion" any practices that appear to violate the Act. 29 U.S.C. 626 (a) and (b). In the event the Secretary fails to achieve voluntary compliance with the Act's provisions, he is empowered to bring suit in federal district court for such legal or equitable relief as may be appropriate. 29 U.S.C. 626(b).

Congress also provided in the ADEA, as an alternative to suit by the Secretary, for private actions by "any person aggrieved" by age discrimination in employment. 29 U.S.C. 626(c). But before a private enforcement action may be brought, the Act requires the person alleging age discrimination to provide the Secretary with at least 60 days' notice of intent to file

suit. 29 U.S.C. 626(d). In cases such as the present, involving an alleged incident of age discrimination in a state without a law prohibiting such discrimination (see 29 U.S.C. (Supp. V) 633(b)), the Act also requires that notice of intent to institute a private enforcement action "shall be filed * * * within [180] days after the alleged unlawful practice occurred." 29 U.S.C. 626(d)(1).

If the ADEA is construed to bar courts from entertaining private enforcement actions whenever the person alleging age discrimination has failed to file a notice of intent to sue within 180 days of the asserted violation, the private enforcement provisions of the Act will be substantially weakened. Indeed, judicial decisions—contrary to the decision below—construing the notice provision of the ADEA as a jurisdictional prerequisite to private enforcement actions already have frustrated achievement of the purposes of the ADEA in a significant number of cases. Given the Secretary's responsibilities under the ADEA, and the limited resources available for public enforcement actions (see 29 U.S.C. (Supp. V) 634), the United States has a significant interest in resolution by this Court of the present conflict on the question presented in this case.

STATEMENT

Most of the relevant facts, proceedings below and statutory provisions are set forth in the petition and other papers already filed with this Court. We add only the following observations.

1. Almost immediately following her discharge by petitioner Shell Oil Company, respondent—believing that she had been discharged unlawfully because of her age—consulted an attorney. The attorney informed respondent that she did not need to retain counsel to challenge her discharge, but rather should communicate with the United States Department of Labor. On August 9, 1973, nine days after her discharge, respondent visited the Tulsa, Oklahoma, office of the Wage and Hour Division of the Department of Labor and spoke with Assistant Area Director J. Dean Speer (see Pet. 4).

Speer questioned respondent "about the facts of the case, * * * made notes [and] fill[ed] out [a Labor Department] internal form indicating the substance of her complaint" (Tr. 116).[1] In addition, Speer told respondent that "on the face of it, it appears that you do have a right to complain and I'll investigate and I will let you know" (Tr. 33–34). Because of what Speer considered to be a good working relationship with the Shell Oil Company (Tr. 110–112, 116–119), he immediately undertook to conciliate the matter (Tr. 92–93). Speer called Shell "that very afternoon" (Tr. 112) and informed one of its representatives—Frank Thompson—that respondent had filed a complaint charging age discrimination (Tr. 57). The next day, August 10, Thompson relayed the substance of Speer's telephone call to Kenneth E.

[1] "Tr." refers to the transcript of the hearing in the district court on petitioner's motion to dismiss the present suit for failure to state a cause of action.

Jacobs, Shell's Manager for Employee Relations, whose duties include monitoring compliance with the ADEA (Tr. 53–57).

Approximately one week later, Speer called Jacobs directly and arranged a conference to discuss respondent's complaint (Tr. 58, 126). But all efforts to conciliate respondent's grievance, which began with a conference on or about August 18, 1973, and continued for several months thereafter, were ultimately unsuccessful (see Pet. 4–5).

While conciliation efforts were underway, respondent called Speer on numerous occasions to inquire about the status of her complaint. In each instance, respondent was informed that she would be notified as soon as formal action had been taken but was not told of her right to bring suit under the ADEA or of the requirement that she file notice of her intent to sue within 180 days of the alleged act of discrimination (Tr. 28–29, 34–35, 46–47). Finally, on March 5, 1974, Speer wrote to respondent and informed her that there would be some further delay in completing the investigation. Speer also sent to respondent on March 5 a Labor Department pamphlet which explained the procedures for pursuing complaints under the ADEA (see Pet. 5).

Respondent first learned of the 180-day notice-to-sue provision of the ADEA when she received the materials that Speer had sent to her on March 5, 1974. Upon receiving those materials, she immediately retained an attorney who, on March 14, 1974—216 days after respondent's discharge—filed notice of re-

spondent's intention to sue (see Pet. 5–6). On May 21, 1974, respondent filed the present action in the United States District Court for the Northern District of Oklahoma (Pet. App. 18a).

2. On February 6, 1975, the district court entered an order dismissing the present action on the ground that respondent had not complied with Section 7(d)(1) of the ADEA, 29 U.S.C. 626(d)(1), which requires that notice of intent to institute a private enforcement action "be filed * * * within [180] days after the alleged unlawful practice occurred." The court held that the notice-to-sue provision contained in Section 7(d)(1) of the ADEA is a jurisdictional prerequisite to the maintenance of private enforcement actions and that it must be strictly construed without regard to the equities of the particular case (Pet. App. 1a–15a).

The court of appeals reversed (Pet. App. 16a–26a). It noted that "ample authority" supported the district court's conclusion that compliance with Section 7(d)(1) of the ADEA is a jurisdictional prerequisite to private actions seeking relief from age discrimination (*id.* at 19a). But after having reviewed that authority, and assessing the purposes and legislative history of the ADEA, the court of appeals concluded that "while * * * [the] notice of intent-to-sue requirement cannot be waived, the 180-day time limitation should be interpreted as being subject to possible tolling and estoppel" (*id.* at 23a). The court also held that the circumstances surrounding the filing of respondent's

complaint warranted an equitable tolling of the 180-day notice-to-sue provision and consideration of the complaint on its merits (*id.* at 26a):

> We cannot fault [respondent] in her efforts to present her cause. She twice promptly sought legal advice and twice promptly followed that advice. Short of anticipating an administrative dereliction by the Wage and Hour Division, despite her prodding of that agency, it was not to be expected that lapse of time would void her cause. This is not a case of a plainitff sleeping on her rights nor a defendant in any way being prejudiced thereby either presumptively or in fact. In light of these circumstances and the *de facto* fulfillment of the main purposes of the Act, we hold that the time limitation was tolled until the filing of [respondent's] notice of intent to sue.

DISCUSSION

This case presents to this Court for the first time the question whether the 180-day notice-to-sue provision of the ADEA is subject to equitable tolling, or whether it must strictly be complied with as a jurisdictional prerequisite to private enforcement actions. That question has been the subject of considerable litigation in the lower courts and is of substantial and continuing importance. The holding in this case is in direct conflict wth the holdings of two other courts of appeals, and of several district courts. While we believe that the decision in this case is correct, we believe that the issue presented is of sufficient importance to warrant review by this Court.

1. As the courts uniformly have recognized, Congress patterned the ADEA in substantial measure after Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e *et seq. E.g., Laugesen* v. *Anaconda Co.*, 510 F. 2d 307, 311 (C.A. 6); *Goger* v. *H. K. Porter Co., Inc.*, 492 F. 2d 13, 15 (C.A. 3). Thus, for example, the 180-day notice-to-sue provision contained in Section 7(d)(1) of the ADEA is similar to the provision of Title VII requiring that "[a] charge * * * be filed [with the Equal Employment Opportunity Commission] within [180] days after the alleged unlawful employment practice occurred." 42 U.S.C. (Supp. V) 2000e–5(e). But as the court of appeals pointed out (Pet. App. 20a), there is substantial precedent for allowing equitable considerations to toll the 180-day charging requirement of Title VII. *E.g., Laffey* v. *Northwest Airlines*, C.A.D.C., Nos. 74–1791 and 75–1334 (decided October 20, 1976); *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F. 2d 924, 926–929 (C.A. 5); *Sanchez* v. *Trans World Airlines, Inc.*, 499 F. 2d 1107, 1108 (C.A. 10); contra, *Hinton* v. *CPC International, Inc.*, 520 F. 2d 1312, 1314–1316 (C.A. 8).

We submit that the court of appeals was no less justified in the present case in assessing the circumstances surrounding the filing of respondent's complaint and in deciding whether equitable tolling of the 180-day notice-to-sue requirement was appropriate. The ADEA, like Title VII, "is an intricate statute hedged about with definitional, substantive, and procedural limitations, restrictions, and requirements"

(*Equal Employment Opportunity Commission* v. *Wah Chang Albany Corp.*, 499 F. 2d 187, 189 (C.A. 9)). But as this Court has noted in discussing the procedures prescribed under Title VII, insistence upon procedural "technicalities [is] particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process" (*Love* v. *Pullman Co.*, 404 U.S. 522, 527).[2] Under both Title VII and the ADEA (*Wetzel* v. *Liberty Mutual Insurance Co.*, 511 F. 2d 199, 202–203 (C.A. 3), vacated on other grounds, 424 U.S. 737)—

> the charge of discrimination must be initiated by laymen—people who are apt to be of varying educational backgrounds and certainly few, if any, having knowledge of the subtleties of pleading and of statutory distinctions. * * * [Consequently,] we believe that to deny them access to the federal courts because of a technical error would seriously undermine the policies of the Act and serve only to harm the interests of those whom the Act was designed to protect.

The legislative history of the ADEA indicates that Congress did not intend the notice-to-sue provision to operate as an inflexible time limitation on the maintenance of private enforcement actions. In enacting the

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[2] Despite the express requirement of 42 U.S.C. (Supp. V) 2000e–5(d) that a complaint under Title VII must have been filed by the person aggrieved within 210 days after the alleged unlawful practice occurred or within 30 days after the appropriate state agency has terminated its proceedings, this Court approved in *Love* v. *Pullman Co.*, *supra*, a different practice which equally served the statutory purposes without prejudicing the defendant. Cf. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798.

ADEA, Congress accepted the Administration's proposal that complaints of age discrimination in employment—like claims of discrimination covered by Title VII—be dealt with initially by efforts directed toward conciliation. But it rejected the Administration's further proposal to incorporate into the ADEA the post-conciliation enforcement procedures contained in Title VII. See 113 Cong. Rec. 2794–2796 (1967). Specifically, Congress was concerned that the delays which have plagued the implementation of Title VII not occur under the ADEA, and it therefore incorporated into the ADEA many of the enforcement procedures of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*—which involve somewhat greater emphasis on relief via the courts than is contemplated by Title VII. *E.g.*, 113 Cong. Rec. 7076 (1967) (remarks of Sen. Javits).

Thus, the ADEA, as finally enacted, gave persons alleging age discrimination in employment a right of access to the courts after the expiration of an initial 60-day period during which the Secretary of Labor would attempt to conciliate their claims. 29 U.S.C. 626(d). As the court of appeals pointed out, the basic functions of the 180-day notice requirement in the statutory scheme are "(1) [t]o provide the Labor Department with an opportunity to achieve a conciliation of the complaint while the complaint is still fresh, and (2) to give early notice to the employer of a possible lawsuit, the latter promoting both the preservation of evidence and good faith negotiating on the part of the employer during the conciliation

period" (Pet. App. 24a–25a). The court of appeals was amply justified in concluding that both of these goals had been satisfied in the present case, despite respondent's failure to file with the Secretary until 216 days after her discharge a notice of her intention to file suit. Cf. *Love* v. *Pullman Co.*, *supra*, 404 U.S. at 526.

2. Despite our belief that the decision in this case is correct, we support the petition for a writ of certiorari because of the importance of the issue presented and because of the conflict on the issue in the courts of appeals. The holding in this case that the notice-to-sue provision of the ADEA is jurisdictional only in the sense that such notice must be filed before a private enforcement action can be maintained is in direct conflict with holdings of the Fifth and Sixth Circuits. *Eklund* v. *Lubrizol Corp.*, 529 F. 2d 247 (C.A. 6); *Ott* v. *Midland-Ross Corp.*, 523 F. 2d 1367 (C.A. 6); *Hiscott* v. *General Electric Co.*, 521 F. 2d 632 (C.A. 6); *Edwards* v. *Kaiser Aluminum & Chemical Sales, Inc.*, 515 F. 2d 1195 (C.A. 5); *Powell* v. *Southwestern Bell Telephone Co.*, 494 F. 2d 485, rehearing denied, 498 F. 2d 1402 (C.A. 5). The holding in the present case recently has been approved in at least one district court decision (*Sutherland* v. *SKF Industries, Inc.*, 419 F. Supp. 610, 616 n. 4 (E.D. Pa.)), but it conflicts with the weight of district court authority (see cases cited at Pet. 13–14 n. 5).

The importance of the issue presented here stems in part from the fact that the ADEA is applicable to

all personnel actions of any employer, with 20 or more employees, in any industry affecting interstate commerce. The provisions of the Act also apply to recruiting, advertising and referrals by employment agencies serving covered employers and to specified actions by unions having 25 or more members and which represent or seek to represent the employees of such employers. 29 U.S.C. 623 and (Supp. V) 630. Increased familiarity with the provisions of the ADEA has resulted in a rapid increase in the number of age discrimination complaints that have been filed. Complaints filed with the Secretary of Labor in fiscal years 1973, 1974, 1975 and 1976 numbered, respectively, 2208, 3040, 4717 and 5824. United States Department of Labor, *Age Discrimination in Employment Act of 1967: A Report Covering Activities Under the Act During 1975*, p. 6 (1976) (*"Age Discrimination Report"*).

These figures provide some indication of the importance of preserving the availability of private enforcement actions to enforce the ADEA. To the extent that private enforcement actions are an effective alternative to suit by the Secretary, the Secretary is left free to devote the limited public resources that have been made available (see 29 U.S.C. (Supp. V) 634) to cases of significant precedential value and to those arising out of company-wide patterns and practices. Cf. *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (relying upon similar considerations in the enforcement of the housing discrimination provisions of the Civil Rights Act of 1968).

Conversely, to the extent that private litigation is bedeviled by procedural complexities and pitfills, its significance as an alternative to suit by the Secretary is diminished.

The degree to which procedural problems have reduced the efficacy of private enforcement actions is reflected in the fact that through the end of 1975, more than one-half of all reported private actions under the ADEA had been dismissed by the district courts on procedural grounds. *Age Discrimination Report, supra,* p. 14. Almost one-third of all cases were dismissed at least in part because of failure to comply with the notice-to-sue provision of the ADEA. It is, therefore, essential to realization of the purposes of the ADEA that the present conflict on the question presented in this case be resolved.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

ALFRED G. ALBERT,
Acting Solicitor of Labor,
CARIN ANN CLAUSS,
Associate Solicitor,
JACOB I. KARRO,
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Attorneys,
Department of Labor.

JANUARY 1977.

U.S. GOVERNMENT PRINTING OFFICE: 1977

FEB 18 PAGE 2

Supreme Court, U. S.
FILED
JAN 17 1977
MICHAEL RODAK, JR., CLERK

No. 76-678

In the Supreme Court of the United States

OCTOBER TERM, 1976

SHELL OIL COMPANY, PETITIONER

v.

ANNE M. DARTT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ALFRED G. ALBERT,
Acting Solicitor of Labor,
Department of Labor,
Washington, D.C. 20210.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

In our memorandum for the United States as *amicus curiae*, we failed expressly to take into account, in discussing whether the notice-to-sue provision of the ADEA is subject to equitable tolling, this Court's recent decision in *International Union of Electrical, Radio & Machine Workers, AFL-CIO, Local 790* v. *Robbins & Myers, Inc.*, No. 75-1264, decided December 20, 1976. For the reasons briefly stated below, we do not believe that the decision in *Robbins & Myers* lessens the importance of review by this Court of the decision below or requires reversal of that decision.

One of the issues presented in *Robbins & Myers* was whether the limitations period specified in Title VII of the Civil Rights Act of 1964, governing the filing of charges under that statute with the Equal Employment

Opportunity Commission (EEOC),[1] was tolled during the pendency of grievance proceedings provided for in the collective-bargaining agreement.[2] In holding that plaintiff's invocation of the grievance process had not tolled the statutory period for filing a claim with the EEOC, this Court relied upon the fact that the plaintiff "was not [in the grievance proceeding] asserting the * * * statutory claim in a different forum, * * * but was asserting an independent claim based on a *contract* right" (slip op. 8; original emphasis). Thus, unlike the situations presented in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538,[3] and *Burnett* v. *New York Central R. Co.*, 380 U.S. 424,[4] invocation of the grievance

[1]At the time of the discharge complained of in *Robbins & Myers*, Section 706(d) of the Civil Rights Act of 1964, 78 Stat. 260, 42 U.S.C. 2000e-5(d), provided in pertinent part that "[a] charge under subsection (a) of this section shall be filed within [90] days after the alleged unlawful employment practice occurred." The 1972 amendments to Title VII extended this limitations period from 90 days to 180 days. Equal Employment Opportunity Act of 1972, 86 Stat. 105. At the same time, Section 706(d) was renumbered as Section 706(e), 42 U.S.C. (Supp. V) 2000e-5(e).

[2]The plaintiff in *Robbins & Myers* had filed a charge of racial discrimination with the EEOC 84 days after completion of the grievance steps provided for in the collective-bargaining agreement but 108 days after the date of her discharge (slip op. 2).

[3]This Court held in *American Pipe* that the timely filing of a class action under the federal antitrust laws tolled the applicable statute of limitations during the pendency of a motion opposing certification of a class, and protected the rights of persons ultimately denied participation on a class basis to intervene as named plaintiffs.

[4]The plaintiff in *Burnett* had asserted a claim under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U.S.C. 51 *et seq.*, in state court, which had concurrent jurisdiction over such claims with the federal courts. This Court held that such filing tolled the applicable limitations period, even though the state court suit was dismissed because of improper venue and plaintiff thereafter filed a new complaint in the United States District Court.

process did not satisfy the policies underlying the statutory limitations period . As this Court pointed out (slip op. 11 n. 14; original emphasis):

> Adherence to the limitations period assures prompt notification to the employer of a charge of an alleged violation of Title VII * * *. The grievance process assures no such comparable notice. In the instant case, the grievance alleged only an "unfair action." Even if racial discrimination is explicitly discussed, however, the grievance procedure properly involves only *contractual* questions, and would but fortuitously implicate the Title VII standards [citing *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, and *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454].[5]

In the present case, by contrast, respondent filed an administrative complaint under the ADEA within nine days of her discharge (see Pet. 4). Shell was formally notified the same day of respondent's complaint, and conciliation efforts under the ADEA began almost immediately (see Pet. 4-5). The present suit is based upon the same cause of action as the earlier conciliation

[5]In *Johnson* v. *Railway Express Agency, Inc., supra*, this Court held that the timely filing of a charge with the EEOC pursuant to Section 706 of Title VII did not toll the running of the statute of limitations applicable to an action, based upon the same facts, under 42 U.S.C. 1981. In reaching that conclusion, this Court emphasized (421 U.S. at 467; footnote omitted):

> [P]erhaps most importantly, the tolling effect given to the timely prior filings in *American Pipe* and in *Burnett* depended heavily on the fact that those filings involved exactly the same cause of action subsequently asserted. This factor was more than a mere abstract or theoretical consideration because the prior filing in each case necessarily operated to avoid the evil against which the statute of limitations was designed to protect.

efforts, involves the same allegations and must be assessed pursuant to the same statutory standards. Thus, unlike the situation in *Robbins & Myers* and related cases, respondent fulfilled the policies underlying the notice-to-sue provision of the ADEA. We therefore submit that the court of appeals correctly held that respondent is entitled to consideration of the present suit on its merits.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

ALFRED G. ALBERT,
Acting Solicitor of Labor.

JANUARY 1977.

DOJ-1977-01

Supreme Court, U. S.
FILED
MAR 31 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

In The Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-678

SHELL OIL COMPANY,
Petitioner

V.

ANNE M. DARTT,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 15, 1976
CERTIORARI GRANTED FEBRUARY 22, 1977

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-678

SHELL OIL COMPANY,
Petitioner

V.

ANNE M. DARTT,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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7/24/74	Further hearing on Df.'s Motion to Dismiss.
8/22/74	Further hearing on Df.'s Motion to Dismiss.
2/6/75	Order entered dismissing Complaint for lack of subject matter jurisdiction.
3/5/75	Notice of appeal filed by Pf.
4/18/75	Appeal docketed in Tenth Circuit Court of Appeals.
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IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NO. 74-C-221

ANNE M. DARTT,
Plaintiff,

v.

SHELL OIL COMPANY,
Defendant.

Attorney's Lien Claimed

Filed May 21, 1974

COMPLAINT

I

This action arises under the provisions of Section 7(b) of the Age Discrimination in Employment Act (ADEA) (29 U.S.C., Sec. 626(b) and Sec. 16(b) of the Fair Labor Standards Act (F.L.S.A.) (29 U.S.C., Sec. 216 (b). The amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs. Jurisdiction of this Section is conferred on this court by said Sec. 7(b) of the ADEA (29 U.S.C., Sec. 626(b) and by Title 28 USC, Sections 1331 and 1332.

II

Plaintiff herein is a resident of the City of Tulsa, State of Oklahoma. Plaintiff is 52 years of age.

III

The defendant, Shell Oil Company, is a foreign corporation, incorporated under the Laws of the State of Delaware. They are licensed to do business within the State of Oklahoma, and they own and operate a Credit Card Center located in Tulsa, Oklahoma, where plaintiff

was previously employed by them. The acts and occurrences upon which plaintiff bases her cause of action occurred within the jurisdiction of this court.

IV

Plaintiff alleges that at all material times hereinafter mentioned, defendant employed its employees at its said Credit Card Center in transporting, selling, handling or otherwise working on goods that have been moved in or produced for commerce, as defined in Section 11(g) of the ADEA (29 U.S.C., Sec. 630(g)). Defendant has other facilities located throughout the United States which they operate and which are all similarly engaged in Interstate Commerce. Said defendant was, and is, therefore, engaged in commerce within the meaning of the ADEA, and was, and is, engaged in an industry affecting commerce as defined in Section 11(h), of said Act (29 U.S.C., Sec. 630(h)).

V

During the period since July 2, 1964, defendant has been engaged in an industry affecting commerce, as aforesaid, and has employed at its said Credit Card Center twenty-five (25) or more employees for each working day in each of twenty (20) or more calendar weeks in the preceding calendar year. Said defendant was, and is, therefore an employer within the meaning of Section 11(b) of the ADEA (29 U.S.C., Sec. 630(b)).

VI

Plaintiff is an adult woman, 52 years of age, and brings this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on her own behalf and on behalf of all other persons between the ages of 40 and 65 years, who are employed by the Shell Oil Company, and who are similarly situated and who are subjected to and affected by the discriminatory and unlawful employment practices committed by respondent company.

VII

Furthermore, plaintiff brings this action on her own behalf and on behalf of all other persons who are either presently employed by Shell Oil Company and are between the ages of 40 and 65 years, or who have been discharged by the defendant, Shell Oil Company, within the preceding 180 days, and on behalf of all persons between the age of 40 and 65 years who have applied or will apply for employment at respondent company.

VIII

As to each class of persons described above, the class is so numerous, the joinder of all members is impracticable. There are questions of law and fact common to the class, the claims of the plaintiff will fairly and adequately protect the interests of the class and respondents have acted, or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

IX

Plaintiff was employed by the defendant from January 3, 1966, to July 31, 1973, during which time she progressed to the position of senior analyst. That on April 16, 1973, the plaintiff was transferred by the defendant to a new and different department on a special assignment. That upon completion of the special assignment, she was informed by the defendant that she would not be able to return to her customary work. Plaintiff alleges that later on July 31, 1973, the defendants informed her that they had reorganized the credit department, wherein she had previously been working and that all the positions were filled, and that they had nothing for her, so they were forced to terminate her. That the defendant did, in fact, terminate plaintiff on July 31, 1973. Plaintiff alleges that she was terminated solely because of her age.

X

Plaintiff alleges that the defendant did, during the time that she was employed by the defendant and prior to her termination, discriminate against her in employment on the basis of age, in that:

1. Defendant refused to promote plaintiff on a merit basis, but instead promoted younger employees of inferior ability over her;

2. Defendant arbitrarily adopted a no promotion policy for older employees between the ages of 40 and 65 years;

3. Defendant arbitrarily adopted a policy of discharging and easing out older employees to make room for younger employees;

4. Defendant employed a subjective, unfair, and unlawful testing procedure to effectuate their policy of age discrimination in employment;

5. Defendant discharged plaintiff solely on the basis of her age;

XI

Plaintiff alleges that prior to filing the instant action, plaintiff notified the Secretary of Labor in writing of her intent to do so, and, as plaintiff is informed and believes, the Secretary of Labor informed the defendant of his receipt of said notification and attempted, but failed, to effect voluntary compliance with the requirements of the ADEA on the part of the defendant through conciliation, conference and persuasion. More than 60 days have elapsed since said notice was sent by plaintiff to the Secretary of Labor as aforesaid. A copy of said notice is attached hereto as Exhibit "A".

XII

As a result of defendant's willful discharge of the

plaintiff, and as a result of defendant's willful discrimination against plaintiff during the period of her employment solely on the basis of age, all in willful violation of the ADEA, as aforesaid, and contrary to the provisions of Section 16 of the Fair Labor Standards Act (29 U.S.C., Sec. 216), there is due and owing to plaintiff the sum of $50,000.00 in unpaid minimum wage and overtime compensation.

WHEREFORE, plaintiff prays as follows:

1. That this court issue a mandatory injunction directing the defendant to employ plaintiff in the position of Supervisor or other position commensurate with her experience and ability, or in lieu thereof to require the defendant to pay plaintiff wages commensurate with the position to which she is entitled commonly known as "front pay."

2. That this court award plaintiff the sum of $50,000.00 as unpaid minimum wage and overtime compensation, plus a like sum of liquidated damages for the loss of wages she has sustained to this date, together with the additional sum of $50.00 for each day that elapses until plaintiff is employed by defendant.

3. That this court award plaintiff a reasonable attorney's fee and the costs of this action, together with liquidated damages provided by law.

4. That this court grant plaintiff such other, further, legal and equitable relief to which this plaintiff may be entitled.

GREER AND GREER

BY_____

Jefferson G. Greer
206 Beacon Bldg.
Tulsa, Oklahoma 74103
(918) 584-3591
Attorneys for plaintiff

March 14, 1974

Department of Labor
Room 3014
Page Belcher Federal Bldg.
U.S. Post Office & Courthouse
Tulsa, Oklahoma 74103

Attention: Mr. J. Dean Speer
Assistant Area Director

Re: Mrs. Anne Dartt
8716 E. 30th Street
Tulsa, Oklahoma 74129

Gentlemen:

This letter will serve as our notice that Mrs. Anne Dartt will file a civil action against her former employer, Shell Oil Company, because of their having violated the age discrimination in employment act. As you know, Mrs. Dartt has previously filed a complaint with your office and I understand that you are in the process of making an investigation into the complaint. Mrs. Dartt will file her action in the United States District Court in Tulsa, Oklahoma, at the expiration of the 60 days notice required by Statute.

REQUEST FOR INFORMATION

We respectfully request that you make available to this claimant any and all information which your investigation has or will disclose, all as permitted by law and specifically the Freedom of Information Act. We would appreciate any assistance you can give us in processing this claim.

We will look forward to hearing from you at your earliest convenience.

Very truly yours,
GREER AND GREER
By
Jefferson G. Greer

JGG:lr

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

[Title omitted in printing.]

Filed June 11, 1974

**MOTION TO DISMISS
FOR FAILURE TO STATE
A CAUSE OF ACTION**

Comes Now Shell Oil Company, Defendant herein, and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, moves the Court to dismiss this action for failure to state a cause of action, for the following reasons, to-wit:

1) Plaintiff alleges that she was discharged on July 31, 1973, but that she did not file a notice of intent to sue with the Department of Labor until March 14, 1974.

2) Plaintiff further alleges that all discrimination against her occurred no later than July 31, 1973.

3) Plaintiff brings this action pursuant to 29 U.S.C. Sec. 626, which provides in pertinent part that:

> d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice *shall be filed —*
>
> > *1) within one hundred and eighty days after the alleged unlawful employment practice occurred.* (Emphasis supplied)

4.) By her own pleadings, the last day on which the Defendant allegedly discriminated against Plaintiff

was July 31, 1973. One hundred and eighty days from that date is January 27, 1974. Plaintiff alleges that her notice was not filed until March 14, 1974.

5) Plaintiff's notice was untimely filed with the Department of Labor. The timely filing of such notice being a jurisdictional prerequisite to the bringing of a suit, Plaintiff has failed to state a cause of action upon which relief may be granted.

6) Moreover, even assuming that the notice was timely filed, Plaintiff did not file her notice with the Secretary of Labor, as is required by the statute. (See Exhibit A to the Complaint.) Her notice being defective, Plaintiff has not met the jurisdictional prerequisite to the bringing of suit, and, therefore, has failed to state a cause of action upon which relief may be granted.

WHEREFORE, Defendant respectfully prays that this action be dismissed, with costs taxed against the Plaintiff.

DATED this 6th day of June, 1974.

KOTHE AND EAGLETON, INC.

/s/ Mary T. Matthies

Mary T. Matthies
C. A. Kothe
124 East Fourth Street
Tulsa, Oklahoma

Attorneys for Defendant,
Shell Oil Company

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

Case No. 74-C-221

ANNE M. DARTT,
Plaintiff,
-vs-
SHELL OIL COMPANY,
Defendant.

Filed Feb. 6, 1975

ORDER

This case involves the construction and application of Section 7(d) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §626(d). Plaintiff is a former employee of Defendant. She alleges that she was discharged by Defendant solely because of her age. Section 4(a) of the ADEA, 29 U.S.C. §623(a), makes it unlawful for an employer who is covered by the Act to discharge any individual because of the individual's age. The ADEA has application to individuals who are at least forty years of age but less than sixty-five years of age, 29 U.S.C. §631. Plaintiff states she was fifty-one years of age when discharged.

Defendant has filed herein a Motion to Dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure. It is Defendant's position that this Court lacks subject matter jurisdiction to hear this case. Although lack of subject matter jurisdiction is normally attacked through a Motion to Dismiss for lack of subject matter jurisdiction made pursuant to Rule 12(b)(1), Federal Rules

of Civil Procedure, Defendant's Motion is proper herein as Defendant attacks a defect which appears on the face of Plaintiff's Complaint. It is Defendant's position that the Complaint shows Plaintiff failed to file timely notice of an intent to sue with the Secretary of Labor as required by 29 U.S.C. §626(d). This defect, apparent on the face of the Complaint, is an affirmative defense. Affirmative defenses which appear on the face of a Complaint may be asserted by a Motion to Dismiss for failure to state a claim upon which relief can be granted. 5 Federal Practice and Procedure, Civil, Wright and Miller, §1357.

Defendant has raised a substantial jurisdictional question through its Motion to Dismiss. The Court has, pursuant to the direction of *Schramm* v. *Oakes*, 352 F. 2d 143 (Tenth Cir. 1965), held evidentiary hearings to more fully develop the facts necessary to determine the jurisdictional challenge. The pertinent facts of this case as derived from the well pleaded allegations of the Complaint and two evidentiary hearings are found to be as follows:

Plaintiff was employed by Defendant from January 3, 1966 until July 31, 1973. She was terminated at the latter date. At the date of termination Plaintiff was fifty-one years of age. During the period of Plaintiff's employment, since and after 1967, Defendant maintained posted notices informing employees of the ADEA in conspicuous places throughout the places where Defendant was employed.[1] Though Defendant testified she did not see these notices, a reasonably alert employee in the same or similar circumstances as Plaintiff would have seen them. On September 9, 1974, shortly after her termination, Plaintiff contacted Mr. J. D. Speer, an Assistant Area Director of the Department of Labor in the Tulsa, Oklahoma area.

[1] These notices are required by 29 U.S.C. §627.

At this time she complained that she had been fired because of her age. Mr. Speer did not inform Plaintiff that she had a right to maintain a civil action on her own behalf under the ADEA. He stated that he would investigate the complaint. Subsequently, Plaintiff attempted to contact Mr. Speer several times by telephone. In each instance she was informed she would be notified as soon as any action was taken on her complaint. On March 5, 1974 Speer wrote Plaintiff a letter in which he stated there would be a delay in investigating her complaint. In this letter he also informed Plaintiff she had the right to bring a civil action on the basis of her complaint. He enclosed a Department of Labor Pamphlet containing basic information concerning the ADEA. This was the first date on which Plaintiff claims she had actual knowledge of her right to maintain civil action under the ADEA. Thereafter Plaintiff contacted an attorney who, on March 14, 1974, mailed a letter to the Department of Labor addressed to the local office at Tulsa, Oklahoma, for the attention of Mr. Speer, informing the Department that the Plaintiff intended to commence a civil action against the Defendant based on alleged ADEA violations.

29 U.S.C. §626(d) reads in part as follows:

> "No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, . . ."

It is Defendant's position that the face of the Complaint reveals Plaintiff did not file notice of intent to file a civil action within one hundred and eighty days of the alleged discriminatory act and that when notice was filed it was not with the Secretary as is required by the Section,

but was with a local Assistant Area Director. It is Plaintiff's position that the 180 day filing period is directory and not jurisdictional. She further contends she gave adequate notice by informing the Department of the alleged discriminatory act on her initial visit with Mr. Speer. She further contends the filing period should be tolled in this case because the Department failed to inform her of her right to bring a civil action under the ADEA. (To this same end she contends Defendant failed to perform its statutory duty of posting notice informing employees of the ADEA as is required by 29 U.S.C. §627 but the Court resolves this factual issue against Plaintiff as heretofore set out.)

With regard to Plaintiff's contention that the filing of a notice of an intent to sue with the Secretary within 180 days of an alleged discriminatory act is not a jurisdictional prerequisite to the right to maintain a civil action under the ADEA, the Court concludes Plaintiff's position is neither supported by authority nor reason.[2] Literally

[2] Plaintiff relies on *Goger* v. *H. K. Porter Company, Inc.*, 492 F. 2d 13 (Third Cir. 1974) to support her contention that filing notice of intent within the statutory period is not a jurisdictional prerequisite to the right to maintain a civil action. *Goger* deals with 29 U.S.C. §626(d)(2). This section sets the time limits within which notice of intent to sue must be filed in cases falling under Section 14(b) of the ADEA, 29 U.S.C. §633(b). Section 14(b) basically provides that if a state has an agency with authority to deal with age discrimination in employment the state remedy must be attempted before a civil action under 29 U.S.C. §626(d) may be commenced. In *Goger* the plaintiff failed to avail himself of available state remedy. Instead he proceeded directly through the Department of Labor. The time limits within which the plaintiff could have commenced an action under the state law expired. The district court dismissed the action holding that the ADEA required the plaintiff to exhaust available state remedies prior to commencing a civil action. On appeal the Third Circuit held:

> "While we do not consider the failure to file a timely complaint

Continued on p. 14

every reported case which has dealt with the question has held the filing period to be jurisdictional. *Powell* v. *Southwestern Bell Telephone Company*, 494 F. 2d 485 (Fifth Cir. 1974); *Oshiro* v. *Pan American World Airways, Inc.*, 378 F. Supp. 80 (D. Hawaii 1974); *Cochran* v. *Ortho Pharmaceutical Company*, 376 F. Supp. 302 (E.D. La. 1971); *Burgett* v. *Cudahy Company*, 361 F. Supp. 617 (D. Kan. 1973); *Bunch* v. *Barnett*, 62 FRD 615 (D. S.Dak. 1974); *Gebhard* v. *GAF Corporation*, 59 FRD 504 (D.C. D.C. 1973). Also, the intent of Congress is clearly expressed in the statute. Notice of an intent to sue *shall* be filed within one hundred and eighty days of an alleged discriminatory act. Where the language of a statute is

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Footnote 2 Continued from p. 13

with the appropriate state agency a mere 'technical' omission, we nonetheless consider equitable relief to be appropriate in view of the total absence, to our knowledge, of any judicial decision construing section 633(b) during the period involved here and in view of the remedial purposes of the 1967 Act. In the future, however, we think the Congressional intent that state agencies be given the initial opportunity to act should be strictly followed and enforced . . ."

Plaintiff's reading of the case is incorrect. In *Goger* the court granted equitable relief under the circumstances of the case since there were no cases construing the point raised by that plaintiff on appeal. The court did hold that resort to available state remedies was a jurisdictional prerequisite to the maintenance of a civil action based on the ADEA. And the court clearly stated that in the future, now that there was a decision on point, the Congressional intent should be strictly enforced and followed. This case does not by analogy support Plaintiff's position. Indeed, it undermines her position. There are many cases holding that, in situations to which §626(d)(1) applies, filing notice of an intent to sue within 180 days of the alleged discriminatory act is a jurisdictional prerequisite to the maintenance of a civil action. Thus, Plaintiff cannot avail herself of the special circumstances of *Goger*. In fact *Goger* must, in this case, be read to support the proposition that the clear intent of Congress should be applied and enforced.

plain and unambiguous it must be given effect according to its plain and obvious meaning. 82 CJS Statutes §322(2). Thus it is the decision of this Court that filing notice of an intent to sue with the Secretary within 180 days of an act of age discrimination is a jurisdictional prerequisite to the right to maintain a civil action under 29 U.S.C. §626(d)(1).

Plaintiff's second contention is that her act of informing the Department of Labor that she had been fired because of her age constitutes sufficient notice of an intention to sue to either satisfy 29 U.S.C. §626(d)'s notice requirement or to toll the running of the 180 day notice period. This argument is supported by some authority but not by reason. Plaintiff relies on *Woodford* v. *Kinney Shoe Corporation*, 369 F. Supp. 911 (N.D. Ga. 1973). The facts of *Woodford* are very similar to the facts herein. In *Woodford* the plaintiff contacted the Department one hundred and sixty days after she was fired and stated that she had been discriminated against. Apparently she did not state she intended to sue, however, the facts on this point are not specific. The court held:

> ". . . where an employee, within one hundred and eighty days of his discharge, reports to the Labor Department that he has been discharged from his job because his employer discriminates against older workers, the employee's right to file suit later under the Age Discrimination Act is preserved, even if the employee does not in so many words declare to the Department his intent to file such an action."

This decision disregards the clear mandate of 29 U.S.C. §626(d) that:

> "No civil action may be commenced by any individual under this section until the individual has given

the Secretary not less than sixty days' *notice of an intent to file such action . . .*" (Emphasis added.)

It is difficult to equate a complaint of age discrimination made to a local wage and hour office with a notice of intent to bring a civil action filed with the Secretary of Labor. The language of Section 626 could not be clearer as to what is required. To hold that a complaint of age discrimination is a notice of intent to sue is in effect to rewrite a portion of a Federal statute. This is beyond the power of the Court.

The ADEA is enforced according to the powers, remedies and procedures provided by 29 U.S.C. §211(b), 216(b)-(d) and 217. Under 29 U.S.C. §216(c) the Secretary of Labor is authorized to sue on behalf of employees where there is a violation of the Act. Under 29 U.S.C. §216(b) the right of an employee to bring a civil action, in certain circumstances is terminated, when the Secretary commences an action. Thus, when the Secretary of Labor commences an investigation upon the basis of a complaint filed by an employee that he has been discriminated against, the employer does not necessarily have notice that the aggrieved employee intends to sue. In *Powell* v. *Southwestern Bell Telephone Company, supra,* the court stated:

> ". . . It is logical that the 180 day notice was intended to insure that potential defendants would become aware of their status and the possibility of litigation reasonably soon after the alleged discrimination since the notice goes from the Secretary of Labor on to the employer involved."

The Secretary has the power to make investigations under the ADEA, 29 U.S.C. §626(a). In the case at hand Plaintiff filed her complaint with the local wage and hour division. It in turn promised to commence an investigation and did

in fact do so. The investigatory powers of the ADEA are in accordance with the powers and procedures provided by 29 U.S.C. §§209 and 211. It does not appear that under the provisions of these statutes the commencement of an investigation by the Department of Labor would effectively notify an employer that an employee intended to bring a civil action under the ADEA. Thus to hold that the mere filing of a complaint with the Department satisfies the notice requirement of 29 U.S.C. §626(d) thwarts one of the basic purposes of that section that a potential defendant become aware of its status and the possibility of litigation reasonably soon after the alleged discrimination. In fact, as is evidenced by the facts of this case, there is no guarantee that the Labor Department investigation commenced pursuant to a discrimination complaint would even begin within a reasonably short time after the filing of a complaint. The employer would therefore not even have reason to suspect that there was some complaint against it until well after the alleged act of discrimination. This is clearly contrary to the intent of Congress.

It is apparent from the history of the ADEA that Congress was concerned with notice to an employer within a reasonable time after an alleged act of discrimination. In *Powell* v. *Southwestern Bell Telephone Company, supra,* the court noted:

> "Perhaps the most interesting feature of the origin of the 180 day notice limitation is that it appeared in the original bill as introduced in the Senate, was deleted from the House passed bill, and was restored by the amendment in the Senate when the House bill was returned for consideration by the upper chamber. The House concurred in the amendment. Its restoration, together with that of several other portions of the original Senate bill, was 'intended to answer some

> of the disquiet in American business . . . keeping also in mind the practical problems of administration . . .' 113 Cong. Rec. 35056 (Remarks of Senator Javits)."

It is obvious from this history that Congress attached significant importance to the 180 day notice requirement. It cannot be said that the mere filing of a complaint of discrimination with the Department of Labor fulfills the same function as required notice of an intent to sue.

The final clause of 29 U.S.C. §626(d) reads as follows:

> "Upon receiving notice of an intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion."

The filing of notice of intent to sue performs two functions. The prospective defendant is promptly notified of the possibility of litigation. And the Secretary is induced to promptly begin informal methods of conciliation, knowing that a civil action will proceed if he does not obtain results. It cannot be said that these functions are performed by the mere filing of a complaint of age discrimination with a local office of the Department of Labor. It does not appear that in the enforcement provisions of the ADEA applicable to the Secretary that there is any requirement of promptly notifying an employer that a complaint has been filed against it. Nor does it appear that there is any requirement that the Secretary promptly act on a complaint. Therefore, the mere registration of a complaint of age discrimination with the local wage and hour division of the Department of Labor cannot be held by this Court to satisfy the notice requirement of 29 U.S.C. §626(d).

Plaintiff's final argument is that the 180 day notice period was tolled when she filed her complaint with the Department and it failed to notify her of her right to sue until after the 180 day notice period had expired. Defendant argues that Plaintiff's mere ignorance of her legal rights does not toll the running of the notice period. It is axiomatic that a person's ignorance of his legal rights will not toll the running of a statute of limitations. 54 CJS, Limitations of Actions, §205. Although a traditional statute of limitations is not involved herein, the same principle should apply. All persons are charged with knowledge of the provisions of statutes. 58 AmJur 2d, Notice, §21. Therefore, Plaintiff must be charged with notice of the provisions of 29 U.S.C. §626(d). Also, as has been previously found herein, Defendant maintained, throughout the period of Plaintiff's employment, posted notices regarding the ADEA. These notices were conspicuously posted as is required by 29 U.S.C. §627. Although Plaintiff testified that she never saw the notices, her testimony is unbelievable. It must be concluded that a reasonably aware person in the same or similar circumstances would have seen the notices. Thus, Plaintiff had not only presumptive notice of the content of the ADEA but she also must be charged with constructive knowledge from the posted notices which would lead a reasonable person to know or to inquire into his legal rights under the ADEA.

Defendant also argues, convincingly, that the mere filing of a complaint with the Department of Labor by Plaintiff did not toll the notice period since such action is permissive and not mandatory. The use of a permissive administrative remedy does not toll running of a statute of limitations. *Steel Improvement & Forge Company* v. *United States*, 355 F. 2d 627 (Ct. Cl. 1966); *O'Callahan* v. *United States*, 451 F. 2d 1390 (Ct. Cl. 1971). Recourse

to the Department of Labor is not mandatory under the ADEA except to give the required notice of intent to sue. An aggrieved employee does not have to file a complaint with the Department. An employee who wants to file his own civil action only has to notify the Department that he intends to bring such an action. There is a mandatory sixty day waiting period in which the Secretary is supposed to mediate, but this alone does not appear to make the administrative remedy mandatory. Further, the aggrieved party is not bound by the result of any settlement achieved by the Secretary in such mediation. If not satisfied the employee may sue if the required notice of intent to sue is accomplished.

It is a well settled general rule that in a given situation a statute of limitations will be tolled if the Congressional purpose which motivated the involved legislation will thereby be effectuated. *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U.S. 356, 88 L. Ed. 96, 64 S Ct 128 (1943); *Burnett* v. *New York Cent. R. Co.*, 380 U.S. 424, 13 L Ed 2d 941, 85 S Ct 1050 (1965); *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538, 38 L Ed 2d 713, 94 S Ct 756 (1974). In *Burnett* the Court stated:

> ". . . the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances.
>
> In order to determine congressional intent, we must examine the purpose and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act."

The Congressional purposes underlying the limitations period provided by 29 U.S.C. §626(d) have been previously considered. That policy as discussed in *Powell* v. *South-*

western Bell Telephone Company, supra, was to make potential defendants aware of their status and the possibility of litigation reasonably soon after the alleged discrimination. This would promote the good faith negotiation of employers during the 60 day conciliation period provided by 29 U.S.C. §626(d). It also provides the opportunity for preservation of evidence and records for use at a trial necessitated by a failure of negotiation. It has been seen from the history of the ADEA that Congress considered the notice provisions to be important. The policies underlying the ADEA are set out in the first section of the Act, 29 U.S.C. §621. That section reads in part, as follows:

> "It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."

The remedial scheme of the Act is basically two fold. An individual employee may enforce the rights created by the Act through an individual action or the Secretary may bring an action on behalf of employees. The Act encourages settlement of differences through the use of state remedies or conciliation through the offices of the Secretary.

In considering the factors delineated in *Burnett*, it is the conclusion of this Court that the purposes of the Act will not be best effectuated through tolling the limitations period herein. Plaintiff relies heavily on *Burnett*. In that case the plaintiff commenced an action under the Federal Employer's Liability Act (FELA) in a state court of competent jurisdiction. The action was dismissed due to venue provisions of the Ohio law. Plaintiff promptly refiled in a Federal District Court of competent jurisdiction. However,

between the time of commencing the state action and the Federal action, the statute of limitations provided by the Act had expired. The District Court dismissed the action on the grounds that the statute of limitations had run. The Circuit Court of Appeals affirmed. The Supreme Court reversed.

The Supreme Court held that statutes of limitations are designed to promote fairness to defendants. Such statutes promote justice by preventing surprises through the assertion of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The Court noted that in the case before it the petitioner did not sleep on his rights but filed a timely action in a court of competent jurisdiction. Service of process was had on the defendant notifying it that the petitioner was asserting his rights by suit. Venue was improper under Ohio law but the defendant could have waived venue. The court held that the defendant could not rely on the policy of repose since it was aware that the plaintiff was asserting its rights by suit. Thus, the Court held that the statute of limitations was tolled by the filing of the state court action.

Congress has written into the ADEA an 180 day notice requirement designed to give potential defendants prompt awareness of their status. The traditional policy reason behind a statute of limitations mentioned in Burnett, the promotion of justice by preventing surprise through the assertion of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared, may not have full effect in such a short period of time. Congress nevertheless deemed quick notice to potential defendants to be essential to its new statutory scheme to alleviate the problems of age discrimination in employment. If in creating a new right

Congress deems speedy notice essential, as it obviously did in the case of the ADEA, the courts ought not to avoid the notice requirement for any less compelling reason than would justify the tolling of a statute of limitations. The fact that the plaintiff commenced action in a court of competent jurisdiction and served defendant with timely notice was central to the *Burnett* decision. There was no such comparable action herein by which Defendant was notified of an action against it. The rationale of *Burnett* is therefore inapplicable to this case

Plaintiff suggests that the policy of the ADEA is humanitarian and remedial, hence timely notice should be waived in this case. It is also the policy of the Act to give potential employers prompt notice of their status as potential defendants. In this context where Plaintiff did not take any action which would justify the tolling of a statute of limitations in a parallel situation, the above policies of the Act are evently balanced and one does not outweigh the other. In such situation the intent of Congress should be fully applied. Plaintiff was not prevented from asserting her rights by the failure of an employee of the Department of Labor to inform her of them. There is no such duty imposed by the ADEA, nor is one mentioned in the relevant CFR. Plaintiff is assumed to know the law and was possessed of more than enough information to put a reasonable person on inquiry. In this case there are no facts which justify the tolling of the 180 day limitations period. This is not to say that Plaintiff's rights are completely lost. There appears to be yet a possibility that the Department of Labor will undertake and obtain successful action on her part. Her dependence on these Departmental efforts appears to be just in this case as she elected to put her case in its hands and rely on it and not inquire into and pursue her own rights.

Plaintiff contends that she should be allowed to maintain this action as a class action under the "private attorney general" doctrine even if she is found not to have standing to sue on her own behalf. It is her position that she can maintain this action on behalf of similarly situated employees of Defendant even if she is precluded from recovery. Plaintiff relies on *Jenkins* v. *United Gas Corporation*, 400 F. 2d 28 (Fifth Cir. 1968); *Bowe* v. *Colgate-Palmolive Company*, 416 F. 2d 711 (Seventh Cir. 1969); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 (Eighth Cir. 1970) and *Hutchings* v. *United States Industries, Inc.*, 428 F. 2d 303 (Fifth Cir. 1970) in support of this proposition. Each of these cases appears to be distinguishable from the case at hand in that the involved plaintiffs had, at least initially, standing to sue. Herein Plaintiff does not even have initial standing to sue.

Moreover, in *O'Shea* v. *Littleton*, 414 U.S. 488, 38 L. Ed. 2d 674, 94 S Ct 669 (1974) the Court stated:

> ". . . if none of the named Plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class . . . "

Article 3 §2 of the Constitution requires that the judicial power of the United States may not be exercised unless there is an actual case of controversy before it. In order for there to be a case or controversy a plaintiff must have a personal stake in the outcome of a controversy. *Baker* v. *Carr*, 369 U.S. 186, 7 L. Ed. 2d 663, 82 S Ct 691 (1962); *O'Shea* v. *Littleton, supra*. It has been previously determined that Plaintiff herein has no standing to sue. She could not gain any recovery through the prosecution of a class action against Defendant. She has failed to satisfy a jurisdictional prerequisite to recovery on her own

behalf. Therefore, she does not have a personal stake in the outcome of a class action based on alleged policies of age discrimination perpetrated by Defendant. Thus, Plaintiff does not have a case or controversy with Defendant and cannot bring a class action on behalf of others.

Accordingly, Defendant's Motion to Dismiss should be sustained and Plaintiff's action dismissed for lack of subject matter jurisdiction in this Court.

It is so ordered this 6th day of February, 1975.

/s/ Fred Daugherty
Fred Daugherty
United States District Judge

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 75-1277
(74-C-221)

ANNE M. DARTT,
Plaintiff-Appellant,

v.

SHELL OIL COMPANY,
Defendant-Appellee.

Filed July 22, 1976

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Jefferson G. Greer of Greer and Greer on the brief for Appellant.

Mary T. Matthies of Kothe, Nichols & Wolfe, for Appellee.

Jacob I. Karro (William J. Kilberg, Solicitor of Labor; Carin Ann Clauss, Associate Solicitor; Sylvia S. Ellison, Paul D. Brenner; and Ronald M. Gaswirth, Regional Solicitor, of counsel, on the brief) for The Secretary of Labor as Amicus Curiae.

Before LEWIS, Chief Judge; BREITENSTEIN and BARRETT, Circuit Judges.

LEWIS, Chief Judge.

Mrs. Anne M. Dartt sued the defendant Shell Oil Company alleging violations of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, and the Fair Labor Standards Act (FLSA), 29

U.S.C. §§ 201 *et seq.* The trial court dismissed Dartt's action for lack of subject matter jurisdiction because of Dartt's failure to file her notice of intent to sue within the 180-day period as required under 29 U.S.C.S. § 626(d)(1).[1]

Dart had been employed at Shell's Credit Card Center in Tulsa, Oklahoma, from January 3, 1966, to July 31, 1973, at which time she was discharged. Ostensibly, Dartt was terminated by Shell because a reorganization of the credit card department had left her without any work. Dartt, who was fifty-one years of age at the time of her termination, believed that her discharge was prompted because of her age and therefore contacted an attorney. She was told by this attorney that it was unnecessary to have an attorney and that she should instead contact the Federal Wage and Hour Division. Pursuant to this advice, on August 9, 1973, Dartt met with J. Dean Speer, the Assistant Area Director of the Department of Labor's Wage and Hour Division in Tulsa. Mr. Speer interviewed Dartt, filled out the Department's complaint form, and instructed Dartt that he would investigate. When asked how long the investigation would take, Speer responded that it might take a year.

Believing that he had a good working relationship with Shell, Speer called Shell immediately following Dartt's visit to his office in an attempt to conciliate Dartt's complaint. Speer met several times with Shell's manager of

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[1] Section 626(d) provides in part:

> No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed —
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred . . . .

employee relations, but concluded that his conciliation efforts with Shell were unsuccessful and moved into what he termed "an investigative posture." At this time Shell agreed to make internal studies and to prepare statistical information on its hiring and promotion practices as requested by Speer in his investigation of Dartt's complaint.

Finally, after not having received the requested information from Shell, Speer notified Dartt by letter dated March 5, 1974, that there would be some delay in completing the investigation. In this letter Speer discussed her private right to sue, enclosed a pamphlet detailing the provisions of the ADEA, and directed Dartt's attention to the time limitations for filing one's own lawsuit. Dartt testified that the letter and pamphlet constituted her first actual notice of her right to bring a private action and the 180-day notice requirement. She immediately retained private counsel who on March 14, 1974, mailed a letter to the Tulsa office of the Department of Labor giving notice of Dartt's intention to file a private lawsuit against Shell for violation of the ADEA.

After receiving this notice, Speer attempted to "reconciliate" Dartt's complaint, again without success. Speer notified Dartt's attorney on May 16, 1974, that the Department's efforts had proved unsuccessful and that she was free to take whatever action she wished. The present lawsuit was filed as a class action on May 21, 1974.

Dartt advances essentially two arguments on appeal: (1) While admitting that filing a notice of intent to sue is a prerequisite of a private civil action under the ADEA, Dartt contends that the 180-day period for doing so is not jurisdictional in the sense that it can never be extended and asserts that this is a proper case for such extension; and (2) Even if the 180-day period is not subject to equitable modifications, Dartt's initial complaint to the Wage and

Hour Division was adequate to satisfy the requirement of filing a notice of intent to sue. Dartt's latter argument is supported by the Department of Labor in its *amicus curiae* brief.

At the start we reject Dartt's second argument. Section 626(d) specifically requires a "notice of an intent to file" a private civil action. To hold that a complaint to the Labor Department of an alleged discriminatory employment practice complies with this requirement, even though the complaint never mentions an intent to file a private civil action under the ADEA, would be in complete disregard of the language of the Act. Powell v. Southwestern Bell Telephone Co., 5 Cir., 494 F2 485, 489.

The remaining issue in this case is whether the filing of a notice of intent to sue within the 180-day period provided for in section 626(d)(1) is jurisdictional in the traditional sense that failure to comply is an absolute bar to bringing an action or whether the time limitation is more analogous to statutes of limitation and subject to equitable modifications. Admittedly, ample authority supports the trial court's conclusion that compliance with section 626(d)(1) is a "jurisdictional prerequisite" to any private action under the ADEA.[2] However, after examining the cases and the legislative history, we remain unconvinced that Congress intended the failure to file notice within the

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[2] Ott v. Midland-Ross Corp., 6 Cir., 523 F2 1367; Hiscott v. General Elec. Co., 6 Cir., 521 F2 632; Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 5 Cir., 515 F2 1195; Powell v. Southwestern Bell Tel. Co., 5 Cir., 494 F2 485; Raynor v. Great Atl. & Pac. Tea Co., E.D. Va., 400 F. Supp. 357; Vaughn v. Chrysler Corp., E.D. Mich., 382 F. Supp. 143; Oshiro v. Pan Am. World Airways, Inc., D. Hawaii, 378 F. Supp. 80; Cochran v. Ortho Pharmaceutical Co., E.D. La., 376 F. Supp. 302; Burgett v. Cudahy Co., D. Kan., 361 F. Supp. 617; Gebhard v. GAF Corp., D. D.C., 59 F.R.D. 504.

180-day notice period to be an absolute bar to bringing an ADEA private action.

Because of the similarities between the ADEA and Title VII of the Civil Rights Act of 1964, courts sometimes refer to interpretations of provisions in Title VII for assistance in defining analogous sections of the ADEA. Moses v. Falstaff Brewing Corp., 8 Cir., 525 F2 92, 94; Curry v. Continental Airlines, 9 Cir., 513 F2 691, 693; Goger v. H. K. Porter Co., 3 Cir., 492 F2 13, 15. Title VII requires the complainant to file a charge of alleged unlawful employment practices with the Equal Employment Opportunities Commission (EEOC) within 180 days of the alleged discrimination. 42 U.S.C. § 2000e-5(e). Faced with the issue of whether this Title VII time period was jurisdictional or more like a statute of limitations, the Fifth Circuit held:

> The *ratio decidendi*, however, of the leading cases dealing with timing requirements in general under the Act compels the conclusion that the ninety day requirement [amended in 1972 to 180 days] is not "jurisdictional" in the sense that compliance with it *vel non* determines the jurisdiction of the district court, without respect to any of the other circumstances in a particular case. We accept the view that the requirement should be analogized to statutes of limitations. Equitable modifications, such as tolling and estoppel, that are applied to them should also be applied here.

Reeb v. Economic Opportunity Atlanta, Inc., 5 Cir., 516 F2 924, 928. *Reeb* is not alone in allowing equitable considerations to toll the time limitations established by Title VII. *See, e.g.*, Culpepper v. Reynolds Metals Co., 5 Cir., 421 F2 888, 891; Antonopulos v. Aerojet-General Corp., E. D. Cal., 295 F. Supp. 1390, 1395. The *Reeb* court's holding that the notice period was not jurisdictional in the strict sense was based on the arguments that: (1) Since the complainants under the Act would most likely be laymen, they should not be held to "the technical rules of common law pleading" in filing their charges; (2) Title VII was remedial legislation and therefore entitled to a liberal construction; and (3) Many of the cases calling the time limitation "jurisdictional" were suffering from a "conceptual confusion" since having labeled the requirement jurisdictional they proceeded to toll the time limitation for equitable reasons.

This court has also determined that under certain conditions the 180-day period for filing charges with the EEOC may be tolled. Sanchez v. Trans World Airlines, Inc., 10 Cir., 499 F2 1107, 1108. *See also* Archuleta v. Duffy's Inc., 10 Cir., 471 F2 33 & n.1 (where this court referred to the time limitation for filing a civil action after receiving a right-to-sue notice from the EEOC as a "statute of limitations").

Many of the arguments advanced for tolling Title VII time limitations are applicable to the time limitations in the ADEA. In a recent case discussing section 626(d)(1) time limitations, a court observed that the confusing use of the term "jurisdictional" in some Title VII cases was also occurring in ADEA cases: "Many courts have labeled the filing requirements 'jurisdictional' but have treated them as analogous to statutes of limitations and subject to equitable modifications." Skoglund v. Singer Co., D. N.H., 403 F. Supp. 797, 804. For example, a recent Fifth Circuit case held that section 626(d)(1) prerequisites were jurisdictional, but proceeded to outline several instances where the 180-day notice period might be tolled. Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 5 Cir., 515 F2 1195, 1198. In dictum, the court suggested that the period

might be tolled until an aggrieved employee obtained legal counsel or acquired an actual knowledge of his rights under the ADEA. The court concluded, however, that it need not determine whether tolling was allowable because the plaintiff in that case had failed "to file notice within 180 days of securing counsel or within 180 days of actual knowledge." *Id.* Thus, it appears that even though the Fifth Circuit was the first court of appeals to label section 626(d)(1) requirements as jurisdictional, *Powell, supra,* it has left the door open for possible equitable modification of the 180-day notice period. This conclusion is further supported by the Fifth Circuit's determination that the analogous time limitation in Title VII was not jurisdictional, but subject to modifications. *Reeb, supra.*

Other cases dealing with the ADEA time limitations have also confusingly used the label "jurisdictional" while allowing a liberal interpretation of ADEA requirements. *See, Moses, supra;* Burgett v. Cudahy Co., D. Kan., 361 F. Supp. 617. These conceptual difficulties appear to be caused by an overly broad usage of the term "jurisdictional."

Other arguments support a determination that section 626(d)(1)'s time limitation should be treated as analogous to a statute of limitations. The ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment. *Moses, supra* at 93; *Skoglund, supra* at 801. Additionally, strict compliance with section 626(d)(1)'s time limitation should not be required of laymen attempting to enforce their statutory rights. *Skoglund, supra* at 801; Woodford v. Kinney Shoe Corp., N.D. Ga., 369 F. Supp. 911, 915. *See also* Love v. Pullman Co., 404 U.S. 522, 527; *Reeb, supra* at 928.

We do not contend that a filing of a notice of intent to sue is not a condition precedent to an action under the

ADEA. However, the similarities between Title VII and the ADEA, the liberal reading of analogous time limitations in Title VII, the overly broad usage of the term "jurisdictional" by courts interpreting section 626(d) of the ADEA, the remedial nature of the legislation, and the lack of legal training and guidance for many of the ADEA complainants lead us to conclude that while section 626(d)(1)'s notice of intent-to-sue requirement cannot be waived, the 180-day time limitation should be interpreted as being subject to possible tolling and estoppel.[3] *See Moses, supra; Skoglund, supra; Woodford, supra;* and Bishop v. Jelleff Associates, D. D.C., 398 F. Supp. 579.

Left for consideration is the determination of whether the circumstances surrounding Dartt's complaint contain equitable factors warranting a tolling of the 180-day notice period. Placing emphasis upon Dartt's presumptive knowledge of the law and constructive notice from Shell's posted notices, discussed *infra,* note 5, the trial court held that Dartt was entitled to no equitable relief by way of tolling. We do not agree. Initially, Mrs. Dartt consulted an attorney who told her to take her complaint to the Labor

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[3]This conclusion is not inapposite to our recent holding in Law v. United Air Lines, Inc., 10 Cir., 519 F2 170. In *Law,* we found that filing of the notice was a "precedent" to a private action. In support of said proposition, we stated that we were "in accord with *Powell.*" *Id.* at 171. Tolling was not an issue in *Law* since the notice was filed more than 5 years after the alleged discriminatory act. Also, as we noted in our discussion of *Edwards, supra,* the Fifth Circuit did not intend to "close the door" on possible equitable modifications of section 626(d)(1)'s time limitations by its *Powell* decision. The Fifth Circuit itself noted that it was partially rejecting the plaintiff's tolling theory because the plaintiff "was expressly alerted to the time limitations for possible action, both private and agency assisted." *Powell, supra* at 490. The court in Powell simply was not faced with a situation where the equities dictated a tolling. Neither were we in *Law.*

Department's local Wage and Hour Division office.[4] Dartt promptly did so and was told by Mr. Speer, Assistant Area Director, that it might take up to a year before the investigation was concluded. Anxious to check on the progress of her case, Mrs. Dartt testified that after her initial interview with Mr. Speer, she telephoned Speer at least once a month. It was not until after the 180-day period had run that Dartt was informed that in order to bring a private lawsuit against Shell she would have to file notice of intent to sue within 180 days of the alleged discriminatory act. Immediately Dartt retained another attorney who promptly filed the requisite notice of intent to sue, even though it was 36 days beyond the statutory time period.

An important factor in determining whether to exercise this court's equitable powers to toll section 626(d)(1)'s time limitation is whether to do so would be in keeping

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[4] Dartt testified that when she telephoned an attorney to discuss Shell's possible infringement of the ADEA, the attorney responded: "You don't need an attorney. You need to go to the Federal Wage and Hour Department." Had Dartt's contact been more than a preliminary approach as to possible consultation, we might possibly be led to the conclusion reached in *Edwards, supra,* where the court noted it would be:

> [A] singularly inappropriate situation for such a remedy, in view of the fact that Edwards consulted an attorney long before the 180 day period ran. In such a circumstance, he had the "means of knowledge" of his ADEA rights, for the very purpose of consulting an attorney is to ascertain what legal redress arises out of a factual situation encompassing a supposed wrong. While it may be inequitable to allow an employer to benefit from his own wrong, it would be at least equally unfair to then hold that the employer is estopped from raising the 180 day bar where the injured employee consulted an attorney who either slept on his client's rights or did not believe he had any under the statute.

Id. at 1200 n.8.

with the congressional purpose of the ADEA. The two basic purposes behind the 180-day notice requirement are: (1) To provide the Labor Department with an opportunity to achieve a conciliation of the complaint while the complaint is still fresh, and (2) to give early notice to the employer of a possible lawsuit, the latter promoting both the preservation of evidence and good faith negotiating on the part of the employer during the conciliation period. *Moses, supra* at 94; *Powell, supra* at 488. From the record it appears that both of these purposes were fulfilled in spite of Dartt's tardy filing of the notice of intent to sue. Shell received early notification of Dartt's allegations; a Shell representative was contacted by telephone the same day that Dartt registered her allegations with the Labor Department. Also, the Labor Department attempted to conciliate Dartt's complaint following her initial complaint and well before receiving her notice of intent to sue.

There are other facts which tend to support an equitable extension of the 180-day notice period. For example, even though not required to do so by statute, it was the customary practice of Mr. Speer to advise every complainant of the 180-day notice of intent-to-sue requirement, which he did not do in this instance. Furthermore, Speer testified that he was awaiting certain statistical information which Shell had agreed to provide him before sending Mrs. Dartt the letter of March 5 which notified her of her right to bring a private suit under ADEA and the requirement of filing a notice of intent to sue within 180 days of the discriminatory act. In an indirect manner, therefore, Shell's failure to provide the agreed upon information to the Wage and Hour Division contributed to Speer's failure to notify Dartt of her right to sue prior to the running of the 180-day period. Finally, even though Congress inserted a requirement that employers must post

such information pertaining to the ADEA "as the Secretary [of Labor] deems appropriate to effectuate the purposes of [the Act]," 29 U.S.C. § 627, such notice posted by Shell, even though provided by the Wage and Hour Division, was completely inadequate to inform Dartt as to the 180-day notice requirement.[3]

We cannot fault Dartt in her efforts to present her cause. She twice promptly sought private legal advice and twice promptly followed that advice. Short of anticipating an administrative dereliction by the Wage and Hour Division, despite her prodding of that agency, it was not to be expected that lapse of time would void her cause. This is not a case of a plaintiff sleeping on her rights nor a defendant in any way being prejudiced thereby either presumptively or in fact. In light of these circumstances and the *de facto* fulfillment of the main purposes of the Act, we hold that the time limitation was tolled until the filing of Dartt's notice of intent to sue.

Reversed and remanded for further proceedings consistent with this decision.

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[3]The printed notice which was furnished to Shell by the Department of Labor noted that the ADEA was applicable to persons age 40 to 65, listed the employers who were subject to the Act, and stated:

> If you feel you have been discriminated against in matters of hiring, discharge, compensation, or other phases of employment because of your age, contact the:
>
> U.S. Department of Labor
> Wage and Hour Division

Without discussing whether the notice adequately complied with Congress' language that the notice set forth "information as the Secretary deems appropriate to effectuate the purposes of" the ADEA, 29 U.S.C. § 627, we could not in good conscience hold Dartt to strict compliance of the 180-day notice period by constructive notice of this posting.

JULY TERM — August 19, 1976

Before The Honorable David T. Lewis, Chief Judge,
The Honorable Jean S. Breitenstein, Senior Judge,
The Honorable Delmas C. Hill,
The Honorable Oliver Seth,
The Honorable William J. Holloway, Jr.,
The Honorable Robert H. McWilliams,
The Honorable James E. Barrett and
The Honorable William E. Doyle, Circuit Judges

No. 75-1277

ANNE M. DARTT,
Plaintiff-Appellant,
vs.
SHELL OIL COMPANY,
Defendant-Appellee.
DEPARTMENT OF LABOR,
Amicus Curiae.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Chief Judge Lewis, Senior Circuit Judge Breitenstein and Circuit Judge Barrett to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

By /s/ Linda A. Hall
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

REPORTER'S TRANSCRIPT OF PROCEEDINGS
HAD ON JULY 22 and 24, 1974
and AUGUST 22, 1974
UNITED STATES COURTHOUSE
TULSA, OKLAHOMA

[PROCEEDINGS HAD ON JULY 22, 1974]

[20] * * *

THE COURT: * * * Now, I take it that the Defendant is taking the position that this alleged act of discrimination occurred on July 31, 1973, when the Plaintiff was terminated.

MS. MATTHIES: That's correct, Your Honor.

THE COURT: And that the only notice that you've received is the letter from Mr. Greer, the only notice —

[21] MS. MATTHIES: Of Intent to Sue, Your Honor.

THE COURT: — was the March 14, 1974 letter of Mr. Greer to the Department of Labor.

MS. MATTHIES: It was received some time shortly thereafter, but, yes, Your Honor.

THE COURT: Under date of March 14, 1974?

MS. MATTHIES: Yes.

THE COURT: Does the Plaintiff rely on any other notice besides the notice of this letter?

MR. GREER: No, Your Honor, it's all in. I mean, it's — she made the complaint, she never gave the Notice of Intent to Sue within the 180 days. We can't get around that.

THE COURT: I noticed that you make one comment in your letter. "As you know, Mrs. Dartt has previously filed a complaint with your office and I understand that you're in the process of making an investigation into the

complaint." What does this mean? This is in your letter.

MR. GREER: Yes. Well, when the client first came to me, of course, she had already filed a complaint. She never was in my hands at the time the original complaint was filed. It was just after she got in my hands that the Notice to Sue was given.

[22] THE COURT: You're not relying on this sentence, then, as being a notice under the 180 day Statute?

MR. GREER: Truthfully, I don't think we can qualify it as a Notice of Intent to Sue, as the cases have interpreted that.

THE COURT: All right. I just had a little question as to whether or not you were relying on some 180 day notice other than your letter of March 14, 1974, and you tell me that you're not.

MR. GREER: No.

THE COURT: That's correct?

MR. GREER: Yes, that's right.

* * *

[THE FOLLOWING PROCEEDINGS WERE HAD ON JULY 24, 1974:]

[24] * * *

THE COURT: All right. Now, as I understand, you wished, at the last hearing, to amend your complaint to allege the Defendant did not post notice as required by the Statute; is that right?

MR. GREER: Yes, sir.

THE COURT: All right. This amendment will be allowed. We will hear your evidence.

* * *

ANNE M. DARTT,

being first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

DIRECTION EXAMINATION
BY MR. GREER:

* * *

[25] Q And when were you terminated?

A July 31, 1972 — 73, I'm sorry.

* * *

[26] * * *

Q Now, when you were terminated, you did make a complaint with the Wage and Hour Division?

A Yes, sir.

* * *

First of all, when did you make the complaint?

A It was on or about September 9th.

Q Following your dismissal?

A Yes, sir.

[27] Q All right. Did you receive any communication from the Wage and Hour Division then?

A Not until March 5, '74.

Q All right. Did you receive any information from them regarding time to file your complaint?

A No, sir, I did not. I was not aware until I received it in the mail on March 5th.

Q Did you then receive a letter and a booklet from the Wage and Hour Division, Department of Labor as you stated on March 5th?

A Yes, sir, I did.

Q Would you look at this, please. Can you tell us what that is.

A Well, this is the brochure that they sent me when they sent this letter telling me that they had — Had completed their investigation.

* * *

MR. GREER: Mark this, please. Would [28] you mark this, then, as Exhibit One and this as Exhibit Two.

If Your Honor please, we will offer Plaintiff's Exhibits One and Two.)

* * *

THE COURT: Any objections to Plaintiff's Exhibits One and Two?

* * *

THE COURT: All right. Plaintiff's Exhibits One and Two will be admitted in evidence for the purpose of this hearing.

Q (BY MR. GREER) Now, Mrs. Dartt, after making your complaint at the Wage and Hour Division, were you in contact with anyone at that office?

A Yes, sir. With Mr. Speer, by telephone only, from that time on.

Q Now, did you receive any literature, letter or information directing your attention to your requirement of giving Notice of Intent to Sue between the time that you first filed your complaint and the time you received [29] this letter of March 5th?

A No, sir. This is the first communication that I received from them. Anything — This is the first thing that I had that was written.

Q Did anyone at any time ever advise you of the notice?

A No, sir.

Q I mean of the requirement?

A No, sir.

* * *

CROSS EXAMINATION
BY MS. MATTHIES:

* * *

[31] * * *

Q You said after you were terminated, you filed a complaint some time in September of 1973; is that correct?

A Yes, ma'am.

Q How did you find out where it was that you were supposed to go and file the complaint?

[32] A I looked it up in the telephone directory.

Q Why did you know it was Wage and Hour rather than some other agency.?

A Well, Wage and Hour makes sense, where else would you go. I knew when I — I don't know whether I should discuss the other matters in the case or not, but I felt that the age was the factor and the reason that I was terminated and what I — that's what I was looking for.

Q Fine. And so how do you — I'd like you to go back in your memory and think how you came to believe that the Wage and Hour Division of the Department of Labor was the place where you were supposed to go. Did a friend ask you or tell you?

A No.

Q Did you go to an attorney and have him tell you?

A No, I — Yes. I phoned an attorney, I phoned an attorney looking for information and she stated to me at that time. "I don't believe you need an attorney, you need to go to the Federal Wage and Hour Department."

Q And so it is your testimony that —

A At this one.

Q — that you discovered from this unidentified [33] attorney to file your particular charge.

A yes.

Q How did you file that charge, did you go down to the Wage and Hour?

A I went to his office, yes, ma'am.

Q Did you file a written complaint at that time?

A I didn't write — I didn't sign anything. He took notes and called Shell Oil Company, in my presence while I was sitting there.

Q And who was this individual?

A Mr. J. D. Speer.

Q Mr. J. D. Speer.

A Un-huh.

Q At the time you were in that particular office during this visit, did he hand you any brochures on age discrimination, or anything of this nature?

A No, ma'am. He did not hand me anything.

Q Other than the particular facts surrounding your discharge, what, if anything, did he tell you concerning your right?

A He didn't advise me of any rights when I told him my story. He said, "Well, on the face of it, it appears that you do have a right to complain and [34] I'll investigate and I will let you know." And I said, "How long will this take?" And he said, "Oh, it may take a year." So I was quite surprised when I got the letter from him on March 5th, saying there was 180 day time limit.

Q You said after the period of time when you went down some time in September and filed your complaint, you testified, I believe, that you had several telephone conversations, did you not, with the —

A Yes, ma'am.

Q — Wage and Hour Division of the Department of Labor.

A Un-huh. Un-huh.

Q How many telephone conversations and when were they?

A I tried to call him at least once a month because I was anxious to know what was going on. He told me that they were still investigating and still working on it and he would let me know.

Q Were you aware at the time, Mrs. Dartt, that you could file a suit by yourself?

A No, ma'am.

Q You thought that the Department of Labor was the only —

A That's right. I thought that the Department [35] of Labor would take care of everything and I frankly thought an attorney would be an added expense and if the Department of Labor would handle it, why bother with an attorney.

Q So you talked to the Wage and Hour people several times?

A Yes, ma'am.

Q Once a month?

A At least once a month I spoke with Mr. Speers.

Q And during that entire period, it is your testimony that Mr. Speer never told you that you had a private right to sue?

A That's right.

Q Did anyone else ever tell you —

A No, ma'am.

Q — that you had private right to sue?

A No, ma'am.

Q When you received this letter on March 5, 1974, Plaintiff's Exhibit Number Two, what did you do then?

A Well, after I read the brochure referring to this time, I was quite shocked and at that time I retained Mr. Jefferson Greer to act in my behalf.

Q Did you have any communcations with the Department of Labor concerning that letter?

[36] A No, ma'am. Mr. Greer contacted them for me on this, the day after — the day I filed, he notified them of our intent.

Q The day you filed, I'm not sure I understand.

A I'm sorry, the day I contacted Mr. Greer and told him — gave him my story.

Q At that time you filed, then, your Notice of Intent to Sue?

A Yes, ma'am. Mr. Greer filed it in my behalf.

Q Did you read the copy of the Complaint in this case, the complaint which you filed in this case?

A I'm not sure I understand what you mean.

Q The initial papers that were filed in this case, have you ever read them?

A No, ma'am.

Q Did you ever receive a copy of the letter sent by Mr. Greer to the Department of Labor?

A No, I did not.

Q But it's your testimony that you believe that he sent the letter on the 5th of March?

A No, ma'am. This is the postmark date on my letter from the Department of Labor. It was a few days after that because I have a reply from the — a carbon [37] copy of their reply to Mr. Greer.

Q I'm afraid I don't understand. You're saying that you called him when you received the letter, the letter is dated March 5th, I believe, so —

A This letter —

Q Yes. Plaintiff's Exhibit Number Two.

A Yes. The postmark date on my envelope is March 5th, so probably didn't receive it until the 6th. I later contacted Mr. Greer; Mr. Greer says, "I'm afraid we've missed the time limit but we will file an see because you weren't aware of what was going on." And I — he handled the thing for me, sent the letter to the Wage and Hour Department, and I have a carbon copy of Mr. Speer's letter acknowledging receipt of Mr. Greer's letter. I think it's dated March 15th.

Q And it's your testimony that at the time you initially filed this complaint, you did believe that you were filing the complaint out of time?

A Yes, ma'am.

* * *

[42] * * *

THE COURT: Now, how old were you on the date of termination?

THE WITNESS: Fifty-one.

* * *

Did the Defendant give you any reason for your termination?

THE WITNESS: Yes, sir.

THE COURT: Was this in writing?

THE WITNESS: No, sir.

THE COURT: Who gave you the reason?

[43] THE WITNESS: The Credit Manager, Mr. Al Hogan.

THE COURT: What did he tell you?

THE WITNESS: He told me that he was very sorry but the — they had reorganized the Credit Department, all the positions were filled; therefore, they had nothing for me and therefore must terminate me.

THE COURT: Told you nothing about age having anything to do with it?

THE WITNESS: No, sir. I was told prior to that time by a Supervisor.

THE COURT: Who was this?

THE WITNESS: Mr. Lew Springer.

* * *

[44] * * *

THE WITNESS: He told, when I was placed on special assignment and I had a personnel review, a performance review, and during this review I said, "My project is not finished. When will I be coming back to the Credit Department?" He said, "You probably won't." I said, "Why?" He said, "Well, you have no potential because of your age."

Q When did he tell you this with reference to your termination?

THE WITNESS: This happened about a month before — before termination.

* * *

Then upon termination, you did have a reason to believe you were terminated because of your age?

THE WITNESS: Yes, sir, I did.

* * *

[46] * * *

Now, the first written correspondence you got from Mr. Speer was this letter of March 5, 74?

THE WITNESS: That's right.

* * *

THE COURT: Did you talk to him by telephone in the meantime?

THE WITNESS: Yes, sir.

THE COURT: What did you talk to him about, what did you tell him? What did you talk to him about?

[47] THE WITNESS: Well, on various occasions I would say, how are — "What's going on? How are we progressing? Is there still — Is there a chance that I can go back to work?"

THE COURT: You called about your complaint?

THE WITNESS: Yes, sir.

* * *

THE WITNESS: * * * Since he told me it might take a year for his investigation, I didn't worry about it. I didn't even try to find out anything else. The poster doesn't say anything about a time limitation.

THE COURT: But you didn't see the poster.

THE WITNESS: That's right. But it doesn't say it anyway. I did what the poster said to do, [48] go to the Federal Wage and Hour people, that's what I did.

THE COURT: Did you learn this information from the poster?

THE WITNESS: No, sir.

THE COURT: When did you learn this?

THE WITNESS: I called — I was a member of Iskanderi Club and we had an attorney in the Club and I called my friend and she said — she referred me to Stephanie C. Creemore, who is an attorney with Reinert, Duart and Stewart. She told me, she said, "You don't need an attorney. You need to go to the Federal Wage and Hour Department."

THE COURT: Well, then, you talked to some female lawyer and some male lawyer and then went to the Department, is that it?

THE WITNESS: When I was advised by the lady attorney that I needed to file with the Federal Wage and Hour people and not with an attorney at that time.

* * *

[49]

REDIRECT EXAMINATION

BY MR. GREER:

Q Mrs. Dartt, did you receive any additional wages at the time you were terminated?

A Yes, sir.

Q How much?

A Twenty-four weeks.

Q Was that in a lump sum?

A Yes, sir.

Q Did they deduct taxes, and so forth, from that?

A Yes, sir, they did.

Q That would have paid you up through what, December?

A Around December 31st.

* * *

RECROSS EXAMINATION

BY MS. MATTHIES:

* * *

[50] * * *

Q Weren't you interested as to what your rights were, Mrs. Dartt?

[51] A At that time I had complete faith in the Federal Wage and Hour Department to tell me what my rights were.

Q And you didn't ask what your rights were, then?

A No, ma'am. My right at that time, as far as I was concerned, was to be re-employed by Shell Oil Company, be completely reinstated, and that's what I was working for.

Q You didn't ask for the mechanics of how you do that?

A No, ma'am, I did not.

Q But you did go around looking for an attorney and you did go around looking for a place to file your charge when you first got started, didn't you?

A No, ma'am, I did not. I called a friend, who referred me to an attorney. I didn't go around looking for anybody.

Q But you were sufficiently interested in your rights at that point—

A That's right.

Q — that you found out where to go but once you ended up at the Wage and Hour Division of the Department of Labor, you all of a sudden were no longer interested in your rights?

[52] A I was interested in my rights but I had complete faith in the Federal Wage and Hour Department.

Q But you didn't ask any questions?

A No, ma'am. Not — what right would you have? I was trying to be re-employed.

* * *

[53] KENNETH E. JACOBS,

being first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MS. MATTHIES:

* * *

[57] * * *

Q When did you first learn that Mrs. Dartt had filed a complaint against Shell Oil Company on the basis of age discrimination?

A August 10h of 1973.

Q You said August 10th rather than September?

A Yes.

Q All right. Who informed you of the fact that a complaint had been filed?

A Mr. Dean Speer of the Credit Card Center. I was not at the building that day but he talked with Mr. Frank Thompson, who was my Safety and Training Representative.

Q Did you subsequently talk to Mr. Speer concerning the charge filed by Mrs. Dartt?

[58] A Yes. He called me approximately one week later stating that Mrs. Dartt had talked to him and filed a charge, or a complaint, and he was calling to see if possibly I could arrange a schedule to get together with him and talk about the merits of the case. He specifically told me at that time that she had not —

* * *

Q Did you ever discuss with anyone at the Department of Labor whether or not — or whether, in fact, Mrs. Dartt had filed a Notice of Right to Sue against Shell Oil Company?

A This was brought out in our discussion with Mr. Speer.

Q In August of 1973, you discussed with the Wage and Hour representative whether Mrs. Dartt had filed a Notice of Right to Sue?

A Yes.

* * *

[62] * * *

JAMES D. DAVIS,

being first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

[66] * * *

CROSS EXAMINATION

BY MR. GREER:

Q Mr. Davis, you say placing these posters [67] was part of your responsibility at least part of the time?

A Yes, sir.

Q When did you learn that a person had to file their Notice of Intent to Sue within 180 days?

A It would be —

Q Or did you ever learn it?

A No. I learned about it in this situation.

Q When this situation arose?

A Yes.

Q When Mrs. Dartt filed a complaint?

A Yes, sir.

Q Prior to that time, even though you were working and taking care of it, you didn't know it yourself?

A No, sir.

* * *

[72] * * *

MR. GREER: Well, Your Honor, I'll settle that; we want to be perfectly honest with the Court. [72] I don't think there is anything transpired in the correspondence with Mr. Speer that she ever says "We are going to sue." Her position is that she went to there and presented her complaint and put herself in their hands and from there on, she trusted them. She didn't know that the intent was required.

* * *

THE COURT: Is there any testimony before me that Plaintiff gave a Notice of Intention to Sue in verbal fashion to Mr. Speer?

MR. GREER: No, Your Honor. That's what we're stating; I just inquired of Plaintiff, there is no contention, she did not know it was required. She made her complaint, asked for relief, told them she wanted [74] her job back and that's it.

* * *

[83] * * *

THE COURT: All right, as I understand it, Mr. Greer, you're not contending that the Plaintiff gave to Mr. Speer, on her visit to his office, a verbal Notice of Intention to Sue.

[84] MR. GREER: That's correct.

THE COURT: And, of course, you are not contending, then, that she gave any written Notice of Intention to Sue.

MR. GREER: No, Your Honor.

THE COURT: I am correct, am I, basically you're saying that she placed herself in his hands and he let her rights slip by and that there should be some kind of a tolling and that this should apply to Shell.

MR. GREER: Yes. As we cite in our brief, this is a remedial statute. The Defendant has been prejudiced in no way, he actually and apprized of the circumstances and the claim and I think this is certainly a classic case for the application of the Court's equitable powers of tolling the Statute of Limitations.

* * *

[86] * * *

[THE FOLLOWING PROCEEDINGS WERE HAD ON AUGUST 22, 1974:]

* * *

[87] * * *

J. DEAN SPEER,

being first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. GREER:

* * *

[88] * * *

Q Now, Mr. Speer, can you tell us, or tell the Court, whether you ever gave Mrs. Dartt information as to when she should file her Notice of Intent to Sue? Can you state that you did give her notice?

A Yes, I did give her notice.

Q When was that?

A The only notice of record is March 5, 1974.

Q All right. Did you ever give her oral notice in your conversation with her?

A I cannot recall. I do not remember giving Mrs. Dartt or not giving Mrs. Dartt orally.

* * *

[90] * * *

THE COURT: * * * Would you give us the date that Mrs. Dartt came to your office.

THE WITNESS: August 9, 1973.

THE COURT: One other question, if you don't mind. Is there a difference between filing, with your office, a complaint and giving your office a Notice of Intent to Sue?

THE WITNESS: Yes, sir, there is.

THE COURT: Would you explain the difference to me, please.

THE WITNESS: Well, the Act specifically instructs us that when we receive a Notice of Intent to Sue [91] we must notify two parties, the prospective parties to the lawsuit, and — of the impending lawsuit; and instructs us to attempt, by conciliation, conference or persuasion, to

element the prospective lawsuit by trying to reach some agreement that's amicable to the two parties.

THE COURT: This is when you receive a Notice of Intent to Sue?

THE WITNESS: Notice of Intent to Sue; yes, sir. And it gives us a minimum, or a maximum, whichever you want to look at it, of 60 days; the complainant must give us a minimum of 60 days in which to accomplish the conciliation. With the filing of a complaint, we are under no such restrictions from the time standpoint. We may either attempt to conciliate it. We may immediately go into what I would call an investigation posture, going in and looking at records, interviewing people, what you would normally consider an investigation to determine the facts. Or we may attempt conciliation first of all; and if that's the successful and we feel there is a possibility of a — of noncompliance with the Act, we may then get into an investigative posture and determine the facts and give the company a ruling and give them an opportunity to make the necessary change.

Of course, in the conciliation effort, if I may [92] use my own description, we try to avoid getting in a posture of finger pointing. At this time the Company may eliminate the practice or come to some conclusion without ever admitting any error with respect to the Act. When we get into an investigation posture, we do come to a conclusion and so advise the Company.

THE COURT: May the Department bring suit itself?

THE WITNESS: Yes, sir.

THE COURT: On a complaint?

THE WITNESS: Yes, sir.

THE COURT: And what's your time limit on that?

THE WITNESS: Two years or —

THE COURT: Two years.

THE WITNESS: Same under the Fair Labor Standards Act.

THE COURT: Two years, or three years or willfull?

THE WITNESS: Yes, sir.

THE COURT: Thank you.

Q (BY MR. GREER) Mr. Speer, following the filing of a complaint, did you make an investigation, or attempt to make an investigation, of Shell Oil Company?

A I attempted to conciliate Mrs. Dartt's [93] complaint. The conciliation was unsuccessful. As a result, I asked Shell to provide me with some additional information. We were in that posture at the time the lawsuit was filed, or at the time we received the Notice of Intent to Sue. I then attempted to reconciliate, or get back into the conciliation procedure under our responsibilities when we receive Notice of Intent to Sue. That too proved unsuccessful. I advised you, as Counsel for Mrs. Dartt, that the conciliation was unsuccessful, that you had discharged your duties for the 60 days' notice and you could then pursue, if you wished, which you did.

Q Specifically, Mr. Speer, did you experience any delay in getting the information requested from Shell Oil Company?

* * *

A Well, it's a question of definition of delay. Shell agreed to make some internal studies, develop some statistical information that I requested in November of '73. At the time I received your Notice of Intent to Sue, and to this date, of course — Let me clarify that. At the time I received your Notice of Intent to Sue, I had not received that information with [94] respect to our current posture. I would have to say that I did advise Shell, at such time as you filed your lawsuit, that we were out, that we would not get involved in a conflict between the two parties. But at the time I received your Notice of Intent to Sue, and I advised Shell that I was backing out, I had not received the information that I had requested.

Q Were you awaiting this information before issuing the letter informing the complaintant of notice — of her requirement of the Intent to Sue?

* * *

THE WITNESS: Yes. I was awaiting the information at the time I wrote the letter to her.

[95] * * *

THE COURT: You asked Shell for some information —

THE WITNESS: Yes, sir.

THE COURT: — about this Plaintiff, Mrs. Dartt.

THE WITNESS: In regard to her complaint; yes, sir. Specifically, the information was with regard to practices, in general, with respect to promotions, hiring —

THE COURT: This was instigated because —

THE WITNESS: Yes, sir.

THE COURT: Because of the Plaintiff's complaint.

[96] THE WITNESS: That's correct.

THE COURT: And you sought this information?

THE WITNESS: Yes, sir.

THE COURT: You hadn't received it?

THE WITNESS: That's correct.

THE COURT: Now, I don't understand what you were going to do as far as the Plaintiff's complaint was concerned when you got this information.

THE WITNESS: Well, my intent was to make a determination of the facts, as my conciliation effort had been unsuccessful. I was then going to attempt to make a determination as to whether or not, in my opinion, she had suffered discrimination on the basis of age.

THE COURT: Well, if you should have decided, upon a receipt of this information, that she had been, what would you do?

THE WITNESS: I would have advised the Company

of that determination and given them an opportunity to make the necessary corrections.

THE COURT: Then what would you have done? Say the Company did nothing.

THE WITNESS: Well, I then would have to make a determination or evaluation of whether or not [97] I think the case is litigable, whether or not I think I've got a case, and submit it to attorneys.

THE COURT: For the Department of Labor to sue?

THE WITNESS: Yes, sir.

* * *

THE COURT: What would you have done, as far as the Plaintiff is concerned, with reference to her private lawsuit that she has under the law? She has a private lawsuit, doesn't she?

THE WITNESS: Yes, sir, she does.

[98] THE COURT: The Department has a lawsuit.

THE WITNESS: Yes, sir.

THE COURT: These are two different lawsuits.

THE WITNESS: Yes, sir.

THE COURT: When she came to you, you tell me she filed with you a complaint.

THE WITNESS: Yes, sir.

THE COURT: Did she file with you a Notice of Intent to Sue in her private capacity?

THE WITNESS: Not at that time, no, sir; she did subsequently.

THE COURT: Well, is that by letter from Counsel?

THE WITNESS: Yes, sir.

* * *

[99] * * *

Go ahead. Let me see if I understand. You say that before the Spring of '74, and this would have been when Mrs. Dartt came to you —

THE WITNESS: That's correct.

THE COURT: — that if one came in with a complaint, you orally advised the complainant of the requirements of the Act and they were given a pamphlet.

THE WITNESS: Yes, sir.

THE COURT: Now, I don't believe this is in evidence, is it?

MS. MATTHIES: Yes, Your Honor.

CLERK MILLER: It was a part of the letter.

THE COURT: Maybe we want to get it in evidence. Is this the pamphlet you would have given?

THE WITNESS: Yes, sir.

* * *

[100] * * *

THE COURT: What else would you do with a person who came in, like Mrs. Dartt, and gave you what you say was a complaint of age discrimination, firing complaint?

THE WITNESS: If the handling of the complaint went for an unduly long time, generally with respect to age discrimination, the complaints, we handle them; we start some type of handling immediately. Our experience is that, much as any other type of discrimination, memories begin to fail, this type of thing. We try to move on them as soon as possible, in addition to the fact that both parties could possibly be suffering damages as a result of any delay.

THE COURT: I understand that. But let's go back to the visit; here's a lady that comes in and says, "I was fired because of age."

THE WITNESS: Right.

THE COURT: And she raised a complaint [101] and you give her a pamphlet.

THE WITNESS: Yes, sir. And take the complaint.

THE COURT: You enter the conciliation phase.

THE WITNESS: Yes, sir.

THE COURT: I think the evidence before me indicates that you did call on Shell sometime in September, if I'm not mistaken. Mr. Ken Jacobs said that he first learned of the complaint on August 10th.

THE WITNESS: Yes, sir.

THE COURT: When you visited the Center and talked to his representative.

THE WITNESS: Yes, sir.

THE COURT: He testified that he later talked to you.

THE WITNESS: That's correct.

THE COURT: You called him about a week later, so apparently you got right on it and the following day went to the Center. Now, you were in the conciliation phase.

THE WITNESS: Yes, sir.

THE COURT: And you can't remember whether you told the Plaintiff anything about the Notice of Intent to Sue, verbally, and the 180 day limitation [102] or not, is that right?

THE WITNESS: No, sir, I cannot.

* * *

Q (BY MR. GREER) Mr. Speer, can you tell us whether the Department, at the time that Mrs. Dartt filed her complaint, operated under the assumption that this 180 day period in which they were required to file their Notice of Intent to Sue was jurisdictional or non-jurisdictional?

A Yes, sir, I can tell you.

Q What is your assumption?

A Our attorneys advised us that the — that the Department's position was that the 180 days was not jurisdictional.

* * *

[103] * * *

[103A] * * *

Q Mr. Spheer, when a complaintant comes to your office, do you attempt to discover if they are represented by Counsel or not?

A No. I can't specifically say that we do under the Age Discrimination Employment Act because, even if he is represented by Counsel, the law charges us with a responsibility of trying to eliminate any prospective lawsuit.

Q But, of course, if the Department Plans to file a lawsuit themselves, then you're under no limitation of Notice of Intent to Sue, is that correct?

A That's correct.

MR. GREER: I believe that's all.

THE COURT: He is under the two and three year limitation?

THE WITNESS: Yes, sir.

MR. GREER: Yes.

THE COURT: But the 180 days doesn't affect the Department?

THE WITNESS: No, sir.

* * *

[104] CROSS EXAMINATION

BY MS. MATTHIES:

Q Mr. Speer, I believe you testified that you had a procedure in effect in your office from 1971 until the Spring of 1974 regarding certain types of oral notice and handing of pamphlets and things of this nature. Who set up that procedure?

A I guess I would have to say that I did. I don't think there was a procedure when I came in '71.

Q As Assistant Area Director of the U.S. Department of Labor, is one of your duties setting up procedures such as this?

A Yes.

Q How, if at all, do you monitor or train em-

ployees, new employees coming in with respect to this specific procedure?

A Of course, everyone in the office that has involvement in this type of procedure is advised orally. But in this particular instance, with respect to age discrimination, the handling of this type of complaint, for some reason, has fallen to me. Either myself of the Area Director assigns all work in the Tulsa office and generally when an age discrimination complaint comes in, it always crosses my desk.

[105] Q How many age discrimination complaints per week would you say that you handle?

A When? Now?

Q Let's say in, oh, an average in the three month period, say, from July, August and September of 1973; what was the average per week?

A Per week?

Q Un-huh.

A I would say probably two a month.

Q Two a month.

A During that period of time.

Q Has that number increased since that period?

A Greatly, yes.

Q So it's your testimony, then, that you handle virtually all of the age discrimination complaints that come into the area office, is that correct?

A In initiating the set up of the investigation, yes. I don't personally go out on the investigation on all of them.

A But you do the initial phase?

A Yes.

Q In all of these cases, how many age complainsts would you say you've taken total since you have been in Tulsa, since 1971?

[106] A That would just be a wild guess.

Q One hundred, more than a hundred?

A I'm going to say between 75 and a hundred, somewhere in that neighborhood.

Q In all of those cases, can you recall of any instance where you have failed to give the Plaintiff, at some time during a 180 day period after the complaint is filed, a pamphlet or an oral discussion, or both, of their rights under the Act?

A I'd have to say I can't recall either way. No, I cannot recall a specific instance in which I did not. And if you were to ask me about a case I took in early 1973 or late 1972, I might not be able to remember having the particular discussion with that individual. It was the way that I handled them at that time.

Q In your own mind, Mr. Speer, do you think you advised Mrs. Dartt of her rights and gave her the Pamphlet?

* * *

[108] A I thought about this a great deal since the two opposing counsel have been in touch with me about it. I have to say again that I cannot specifically remember either advising Mrs. Dartt or giving her an pamphlet. If you are going to ask me in my own mind did I or didn't I, I would have to admit that I possibly blew it and did not.

Q And could you equally admit, then, to yourself that you possibly followed your — would you call this your standard procedure?

A Yes, Yes, I would have to admit that I may well have followed that procedure and advised her and gave her the pamphlet.

* * *

[109] * * *

Q Were there any factors about this case that would lead you to believe that you did not follow your standard procedure? Was there anything going on in the office as

that particular time, or anything else which would lead you to believe that you did not follow the procedure?

A Yes.

Q What?

[110] A My relationship with Shell and my belief that if there was a problem, if there was a problem, that it could be handled very expeditiously.

* * *

[111] * * *

Q Do you — I think I'd like to ask you once again, Mr. Speer, in your own mind, do you believe that you gave Mrs. Dartt the Notice or do you believe that you departed from your standard operating procedure?

* * *

A In my own mind, no, I do not believe that I advised Mrs. Dartt; and, yes, I do believe that I departed from my standard procedure.

Q Why?

A For the reasons I've already given you; [112] because of the unique relationship that I had with Shell and my feeling that — the only way I can describe it, without going into detail, there are extenuating circumstances — circumstances, if that's what you want to call them, with regard to the situation by Shell. And, again, admitting that in my — I searched for a proper word to describe my feeling at the time. I wanted to get right to it because I thought it would be resolved. As a matter of fact, I think I called Shell that very afternoon and set up the meeting the next day with Mr. Jacobs, a man in his personnel-employee relations department, thinking full well that it could be resolved very quickly.

* * *

[116] * * *

THE WITNESS: * * * I would have to refer to the unique relationship that I had with Shell.

THE COURT: What is this relationship? You said you had a relationship but you never told me whether it's good, bad or indifferent.

THE WITNESS: Well, I thought it was good.

THE COURT: Is that the kind of relationship you're talking about?

THE WITNESS: Yes, sir. May I describe the relationship, Your Honor?

THE COURT: Well, I think you've described it when you say it's good. I didn't know [117] what it was before but I assumed that it was good —

THE WITNESS: Yes, sir.

THE COURT: — and you thought you could work things out.

THE WITNESS: Yes, sir.

THE COURT: And you were going to sort of short circuit this particular problem because you thought you could work it out. I take it that's the reason you've given me for not using the employee interview form, the reason behind your opinion that you didn't give her this pamphlet, you didn't tell her that she had to file with you a Notice of Intent to Sue within 180 days of the alleged violation or she would lose her rights to a private lawsuit.

THE WITNESS: I did not consciously, assuming, again, that I did not give her a pamphlet or that I did not describe or explain to her her rights, I did not consciously make such a decision at the time she came into the office. What I'm saying is that after talking with her, I did not mull it over and come to the conclusion, while she was sitting there, there is no point in my advising her of her rights or giving her a pamphlet because I know Shell and we will get this resolved. I did not make that kind of decision. If anything, if that were the case, if, as a matter of fact, I did not [118] advise her, nor give her a pamphlet, it was pure oversight in my anxiety, is

really not the word either, I wanted to get on the case because I thought I could get it resolved very quickly. It had only been a matter of only a few days since Mrs. Dartt's termination and I felt if I could get it, and the quicker I got to it, we would get it resolved and the matter would be a very short-termed one. As it turned out, it wasn't. If, as an oversight, I made a very poor guess, and I don't know anything to do but to admit it.

THE COURT: Is it fair for me to assume that you just don't know, really whether you gave her a pamphlet and gave her oral notice about the 180 days or not?

THE WITNESS: It's fair for you to assume that I don't know, yes.

THE COURT: You just don't know one way or the other?

THE WITNESS: That's correct.

THE COURT: She's testified that you did not, do you know this?

THE WITNESS: Yes, sir, I'm aware of that.

THE COURT: Does this influence you in your testimony here?

THE WITNESS: No, sir, it doesn't.

[119] * * *

THE COURT: Did your office recieve a Notice of Intent to Sue by Mrs. Dartt prior to the March 14, 1974 letter from her attorney, Mr. Greer?

THE WITNESS: No, sir.

THE COURT: Was that the first Notice of Intent to Sue you received, the Department received?

THE WITNESS: Yes, sir. March 14, 1974.

THE COURT: Did you answer that letter?

THE WITNESS: Yes, sir.

* * *

[120] * * *

THE COURT: Tell us what you said to Mr. Greer.

THE WITNESS: I quote: "This will acknowledge receipt of your notice" — Let me preface, the date is March 15th, the next day. "This will acknowledge intent of your right to sue against Shell Oil, Tulsa, Oklahoma, on behalf of Mrs. Anne Dartt, Tulsa, Oklahoma, to seek relief from an alleged discriminatory practice under the Age Discrimination and Employment Act of 1967. As you will note in the enclosed pamphlet, the law provides that after receiving a Notice of Intent to Sue, the Secretary of Labor is required to notify the prospective Defendant and try to eliminate any alleged unlawful practice by informal consultation, conference and persuasion. The alleged discriminatory practice is being investigated and we will be in touch with you and your client." And it's my signature over my title.

THE COURT: Then you more or less treated that as a valid Notice of Intent to Sue?

THE WITNESS: Yes, sir.

THE COURT: Even though you received it [121] beyond the 180 day's period?

THE WITNESS: Our instructions, Your Honor, are that we do not advise either party as to the jurisdictional question when we receive a Notice of Intent to Sue.

THE COURT: Now, if someone comes in, as Mrs. Dartt did, immediately after a termination and files a complaint, and you study it and decide there is nothing to it, and she gives you Notice of Intent to Sue, do you then reopen and go through this 60 day's conciliation?

THE WITNESS: Yes, sir, we do.

THE COURT: All over again?

THE WITNESS: Yes, sir, we do. Now, may I ask you a clarifying question? You say we take the complaint and we evaluate it and determine that there is no violation. If we made an inquiry with the company and made the determination, we do not reopen the procedure, we advise

them that we have already attempted to conciliate the matter and they have discharged their responsibility and they may go ahead and attempt to file the suit if they wish. If they've come in to file a complaint and we, in our initial discussion with them, can ascertain that the discharge, or whatever, the alleged discriminatory act was for some reason other than [122] age, we will so advise them and advise them we don't feel they have a case. Then they may file a Notice of Intent to Sue. And, yes, sir, at that point we will attempt to conciliate.

THE COURT: Have you ever completed your investigation in this case?

THE WITNESS: No, sir.

THE COURT: Is it still open?

THE WITNESS: Yes, sir.

THE COURT: You testified that at some point, on advice of the Department Counsel, you didn't consider the 180 day notice requirement to be jurisdictional.

THE WITNESS: Yes, sir.

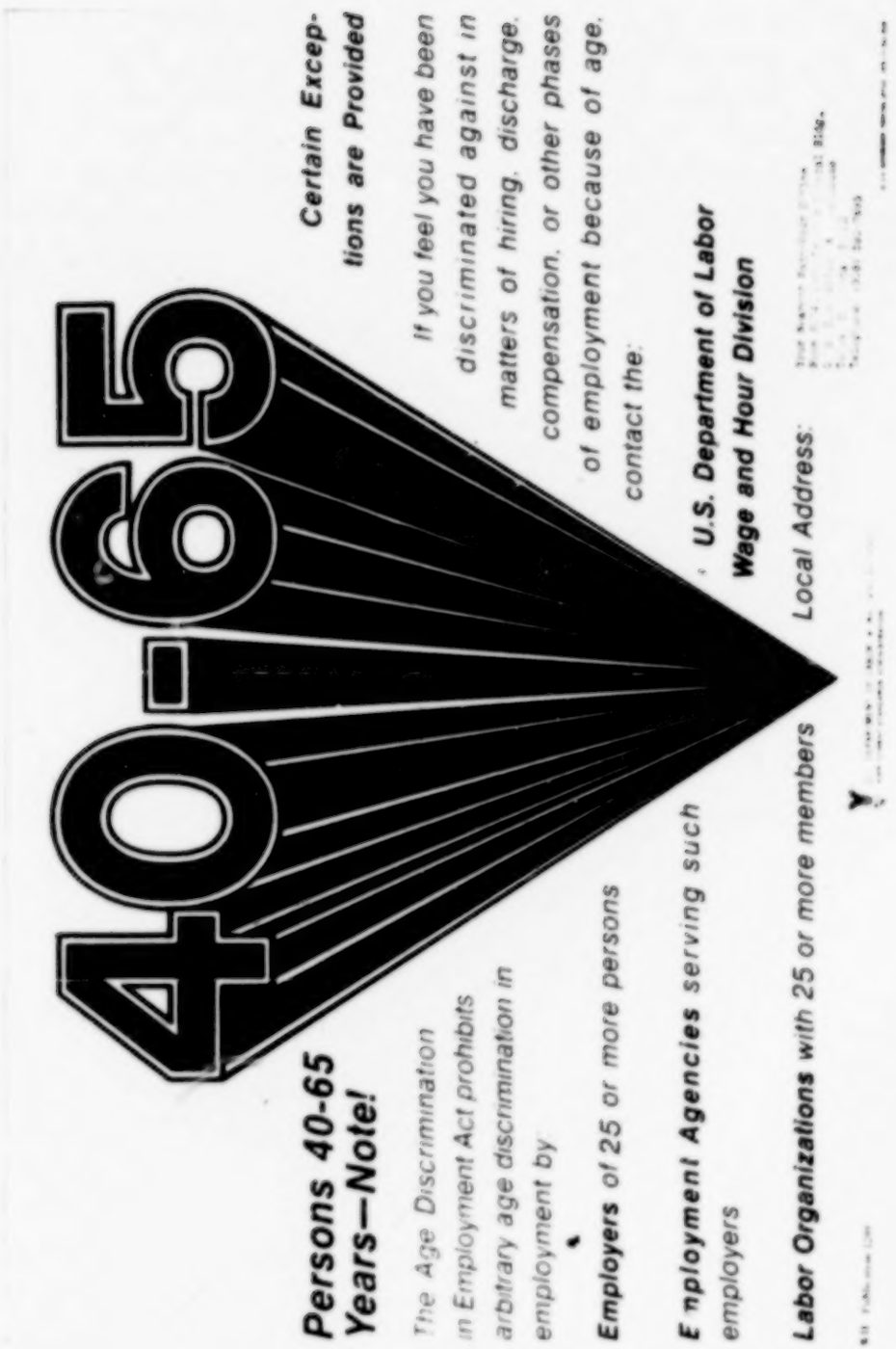
THE COURT: How do you consider it today?

THE WITNESS: The only answer I can give you, Your Honor, it's still in the book, the 180 days is not jurisdictional.

THE COURT: Not jurisdictional?

THE WITNESS: I understand there are decisions, I don't know if there is one in the Tenth Circuit, there is not to my knowledge, I understand there is one elsewhere, I believe in the Fifth Circuit, that the 180 days is jurisdictional but the — our procedural instructions [123] still contain the note that it is the Department of Labor's decision that it is not jurisdictional.

* * *



PLAINTIFF'S EXHIBIT 1

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION
Room 3014 Page Belcher Federal Building —
333 West Fourth
Telephone: 918/581-7695 Tulsa, Oklahoma 74103

DATE: March 5, 1974
REPLY TO
ATTN OF: JDS:db

SUBJECT: ADEA Complaint

TO: Ms. Anne Dartt
8716 E. 30th Street
Tulsa, Oklahoma 74129

As a result of the information you submitted, an investigation of Shell Oil Company, Tulsa, Oklahoma, has been scheduled. I regret that circumstances are such that there will be a delay in completing this investigation.

In view of this delay and to avoid any misunderstanding, your attention is again called to page 4 of the enclosed pamphlet. As you will note, there are certain requirements with specific time limits governing the circumstances under which an employee may file his own suit. The fact that you submitted information concerning an alleged unlawful practice has not been considered a notice to the Secretary of Labor of intent to file suit. We do not, of course, encourage or discourage such suits. This is entirely up to you.

/s/ J. Dean Speer
J. Dean Speer
Assistant Area Director

Enclosure:
Pub. #1230

PLAINTIFF'S EXHIBIT 2

AGE DISCRIMINATION IN EMPLOYMENT ACT

U.S. DEPARTMENT OF LABOR
Workplace Standards Administration
WAGE & HOUR DIVISION

Your Nearest Wage-Hour Office
Room 3014, Federal Building
U. S. Post Office & Courthouse
Tulsa, Oklahoma 74103
Telephone: (918) 581-7695

[PLAINTIFF'S EXHIBIT 2 (Cont.)]

THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

(Public Law 90-202, 81 Statute 602)

The Age Discrimination in Employment Act promotes the employment of the older worker based on ability rather than age; prohibits arbitrary age discrimination in employment; and helps employers and employees find ways to meet problems arising from the impact of age on employment.

The Secretary of Labor is responsible for administering and enforcing the Act. In addition, the Secretary will provide a program of education and information concerning the needs and abilities of older workers and their potential for continued employment and contribution to the economy. This program will include the publication of the results of studies and encourage the expansion of opportunities and advancement of older persons through public and private agencies. The Secretary will sponsor and assist State and community information and education efforts.

The Law

Protects individuals 40 to 65 years old from age discrimination by:

- *Employers** of 25 or more persons in an industry affecting interstate commerce
- *Employment agencies* serving such employers
- *Labor organizations* with 25 or more members in an industry affecting interstate commerce

It Is Against The Law

For an *employer*:

- to fail or refuse to hire, or to discharge, or otherwise discriminate against any individual as to compensation, terms, conditions, or privileges of employment, because of age;

* The term employer does not include the United States, a corporation wholly owned by the Government of the United States, or a State or a political subdivision thereof.

[PLAINTIFF'S EXHIBIT 2 (Cont.)]

- to limit, segregate, or classify his employees so as to deprive any individual of employment opportunities, or adversely affect his status as an employee, because of age;
- to reduce the wage rate of any employee in order to comply with the Act.

For an *employment agency*:

- to fail or refuse to refer for employment, or otherwise discriminate against, any individual because of age, or to classify or refer anyone for employment on the basis of age.

For a *labor organization*:

- to discriminate against anyone because of age by excluding or expelling any individual from membership, or by limiting, segregating, or classifying its membership on the basis of age, or by other means;
- to fail or refuse to refer anyone for employment so as to result in a deprivation or limitation of employment opportunities or otherwise adversely affect the individual's status as an employee because of age;
- to cause or attempt to cause an employer to discriminate against any individual because of age.

For *employers, employment agencies, or labor organizations*:

- to discriminate against a person for opposing a practice made unlawful by the Act, or for making a charge, assisting, or participating in any investigation, proceeding, or litigation under it;
- to use printed or published notices or advertisements indicating any preference, limitation, specification, or discrimination, based on age.

Exceptions

The prohibitions against discrimination because of age do not apply:

- where age is a bona fide occupational qualification reasonably necessary to the normal operations of the particular business;
- where the differentiation is based on reasonable factors other than age;
- where the differentiation is caused by observing the terms of a bona fide seniority system or any bona fide employee benefit plan. This applies to new and existing employee benefit plans, and to the establishment and maintenance of such plans. *However, no employee benefit plan shall excuse the failure to hire any individual.*
- where the discharge or discipline of an individual is for good cause.

Record Keeping And Posting Requirements

Employers, employment agencies, and labor organizations must post an officially approved notice in a prominent place where employees may see it, and maintain the records required by the Secretary of Labor.

Enforcement

The Act is enforced by the Secretary of Labor, who can make investigations, issue rules and regulations for administration of the law, and enforce its provisions by legal proceedings when voluntary compliance cannot be obtained.

Enforcement provisions are similar in nature and closely related to those of the Fair Labor Standards Act. Amounts owing to any person as a result of a violation are to be treated as unpaid compensation under the provisions of

the Fair Labor Standards Act which authorize enforcement through civil actions in the courts.

The Secretary or any aggrieved person may bring suit under the Act. Suits to enforce the Act must be brought within 2 years after the violation, or in the case of a willful violation, within 3 years.

Before the Secretary begins court action, the Act requires him to attempt to secure voluntary compliance by informal conciliation, conference, and persuasion. Before an individual brings court action, he must give the Secretary not less than 60 days' notice of his intention.

This notice must be filed within 180 days of the occurrence of the alleged unlawful practice except, when a State has taken action in accordance with its own laws prohibiting age discrimination, then an individual must file within 300 days of the alleged violation. The law provides that after receiving such a notice, the Secretary will notify the prospective defendants and try to eliminate any alleged unlawful practice by informal conciliation, conference, and persuasion.

Following are methods to recover amounts owed which result from violations of this Act:

1. The Secretary is authorized to supervise the payment of amounts owed;
2. In certain circumstances, the Secretary may bring suit upon written request of the individual;
3. An individual may sue for payment, plus attorney's fees and court costs. In the case of willful violations, an additional amount up to the total of the amount owed, may be claimed as liquidated damages. (An employee may not bring suit if he has been paid the amount owed under the supervision of the Secretary, or if the Secretary has filed suit to enjoin the employer from retaining the amount due the employee.)

4. The Secretary may obtain a court injunction to restrain any person from violating the law, including the unlawful withholding of proper compensation.

The courts, in enforcement actions, are authorized to grant any relief appropriate to carry out the Act's purposes, including among other things judgments compelling employment, reinstatement, or promotion.

Interference with representatives of the Secretary of Labor engaged in duties under the Act are subject to provisions of Sec. 1114 of the Criminal Code (Title 18, U.S. Code).

Additional Information

Inquiries about the Age Discrimination in Employment Act will be answered by mail, telephone, or personal interview at any office of the Wage and Hour Division of the U.S. Department of Labor. Offices are listed in the telephone directory under the U.S. Department of Labor in the U.S. Government listing. These offices also supply publications free of charge.

(971 WHD Publication 1210 Washington, D.C. 20210

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 75-1277

ANNE M. DARTT,
Plaintiff-Appellant,

v.

SHELL OIL COMPANY,
Defendant-Appellee.

AFFIDAVIT

WARREN D. LANDIS, being first duly sworn, states that:

(1) He is the Acting Administrator of the Wage and Hour Division, United States Department of Labor.

(2) By Secretary's Orders 14-71 and 15-71 (36 F.R. 8753, 8756 (May 12, 1971)), concerning the administration of the Age Discrimination in Employment Act of 1967 (Public Law 90-202, 81 Stat. 602, as amended, 29 U.S.C. §621 *et seq.*; hereinafter, the Act), he has been delegated authority and assigned responsibility for making investigations, effecting voluntary compliance and attempting to eliminate discriminatory practices through informal methods of conciliation, conference and persuasion.

(3) The powers thus delegated in accordance with Section 6(a) of the Act are derived from Section 7(a), (b) and (d) of the Act and Sections 9 and 11 of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, as amended, 29 U.S.C. §201 *et seq.*).

(4) As custodian of all compliance files maintained pursuant to the Act, he is in possession of and has examined a file concerning the age discrimination in employment allegations of Mrs. Anne M. Dartt of Tulsa, Oklahoma, against the Shell Oil Company, Credit Card Center, Tulsa,

Oklahoma, which discharged her from its employ on July 31, 1973.

(5) According to information contained in the compliance file, on August 9, 1973, Mrs. Dartt made an oral complaint of age discrimination against her former employer, the Shell Oil Company, to J. Dean Speer, Assistant Area Director, Wage and Hour Division, United States Department of Labor, Tulsa, Oklahoma.

(6) Shortly thereafter, Mr. Speer contacted by telephone and in person K. E. (Ken) Jacobs, Manager for Employee Relations, Shell Oil Company, Credit Card Center, Tulsa, Oklahoma, and informed him of Mrs. Dartt's age discrimination complaint.

(7) By letter dated September 4, 1973, and attachments thereto, Mr. Jacobs provided Mr. Speer with requested materials concerning the employment of Mrs. Dartt and all other employees classified as Senior Credit Analyst as of the date of Mrs. Dartt's discharge.

(8) On October 31, 1973, a compliance conference was held between Mr. Speer and Messrs. Jacobs and James (Jim) Norton of the Shell Oil Company, concerning Mrs. Dartt's allegation of age discrimination and the possibilities for settlement of her complaint.

(9) On November 27, 1973, Mr. Jacobs wrote to Mr. Speer, again asserting that age had not been a factor in the decision to terminate Mrs. Dartt, but agreeing that further discussions would be held with regard to the matter upon completion of "an internal review of [Shell's] employment, transfer, promotion, and performance appraisal policies and practices."

(10) In the period prior to December 1, 1973, on at least two occasions Mrs. Dartt spoke with Mr. Speer

by telephone concerning the status of her age discrimination complaint.

(11) In December 1973 and on January 21 and March 1, 1974, Mrs. Dartt telephoned the Wage-Hour Office in Tulsa, Oklahoma, to inquire about the status of her age discrimination complaint.

(12) By letter dated March 5, 1974, Mr. Speer informed Mrs. Dartt that "there will be a delay in completing this investigation" and notified her of private rights to sue under the Act, enclosing an explanatory publication entitled "Age Discrimination in Employment Act."

(13) By letter dated March 14, 1974 (addressed to the "Department of Labor * * * Attention: Mr. J. Dean Speer"), Jefferson G. Greer of Tulsa, Oklahoma, an attorney representing Mrs. Dartt, gave notice of intent to sue the Shell Oil Company on behalf of Mrs. Dartt for violations of her rights under the Act.

(14) By letter dated March 15, 1974, Mr. Speer acknowledged Attorney Greer's notice of intent to sue on behalf of Mrs. Dartt and informed him of the Labor Department's procedures for attempting to conciliate and settle the grievance.

(15) By letter dated March 15, 1974, Mr. Speer informed Mr. Jacobs at the Shell Oil Company of the receipt of Mrs. Dartt's notice of intent to file suit and of the Labor Department's procedures for attempting to conciliate and settle the grievance.

(16) In April or May 1974, following conversations with Mrs. Dartt regarding terms of settlement agreeable to her, Mr. Speer met with Mr. Jacobs to discuss the possibility of mediating or settling Mrs. Dartt's age discrimination complaint against the Shell Oil Company.

(17) On May 14, 1974, Messrs. Speer and Jacobs talked by telephone once again concerning the possibility of settling Mrs. Dartt's claim.

(18) By letter dated May 16, 1974, Mr. Speer informed Attorney Greer that attempts to conciliate Mrs. Dartt's complaint had proved unsuccessful, that the Labor Department would take no further action with respect to the matter, and that he was free to take whatever action he thought advisable.

(19) By letter dated May 21, 1974, Attorney Greer renewed an earlier request that the Labor Department make available to Mrs. Dartt any and all information disclosed by the investigation and conciliation efforts, as permitted by law and specifically the Freedom of Information Act (Public Law 89-487, 80 Stat. 250, as amended, 5 U.S.C. §552.)

(20) By letter dated July 2, 1974, George T. Avery, Regional Solicitor, United States Department of Labor, Dallas, Texas, informed Attorney Greer that under exceptions to the Freedom of Information Act the Labor Department was precluded from disclosing any materials in the compliance file other than such materials as were provided by Mrs. Dartt herself.

(21) On July 24, 1974, Mary T. Matthies of Tulsa, Oklahoma, an attorney representing the Shell Oil Company, contacted William F. Hamilton, Area Director, Wage and Hour Division, United States Department of Labor, Tulsa, Oklahoma, with a request that Mr. Speer be permitted to testify at a hearing in a suit brought under the Act by Mrs. Dartt against the Shell Oil Company.

(22) On July 29, 1974, Attorney Matthies was contacted by telephone and informed that Mr. Speer would be given permission to testify on the limited question of whether

or not Mrs. Dartt had been notified of her rights under the Act, specifically with respect to the 180-day notice requirement contained in Section 7(d) (1).

(23) By subpoenas dated August 6 and 19, 1974, Mr. Speer was ordered to give testimony at a court hearing and bring with him "the Investigative file in the case of Anne M. Dartt v. Shell Oil Co."

(24) On August 22, 1974, Mr. Speer testified at a hearing in the case of Dartt v. Shell Oil Company (Civil Action File No. 74-C-221) in the United States District Court for the Northern District of Oklahoma in Tulsa.

/s/ Warren D. Landis
WARREN D. LANDIS
Acting Administrator
Wage and Hour Division

U.S. Department of Labor
Washington, D.C. 20210

/s/ Ayaho Lamuna
Notary Public

Subscribed and sworn to before me,
this 24th day of July 1975.
My Commission Expires July 31, 1979

STATE OF OKLAHOMA
COUNTY OF TULSA ss. **AFFIDAVIT**

I, KENNETH JACOBS, of lawful age, being first duly sworn upon oath, depose and say:

That I am the Manager of Employee Relations for the Shell Oil Company Credit Card Center, located at 6502 South Yale, Tulsa, Oklahoma.

During my employment in that capacity, I had occasion to participate in several discussions with J. Dean Speer, Assistant Area Director of the local Wage and Hour Division office, regarding the discharge of Anne M. Dartt.

My first meeting with Mr. Speer regarding the Dartt case was on August 24, 1973. According to Mr. Speer, the purpose of that meeting was to advise Shell Oil Company of the charge by Ms. Dartt and to attempt to discover what the facts were in the case. Mr. Speer told us briefly what Ms. Dartt's allegations were, and I, in turn, advised Mr. Speer that Shell's reason for Ms. Dartt's termination was her poor work performance.

Mr. Speer then asked for some data on performance appraisals for Ms. Dartt and other persons in her job classification, which I subsequently mailed to him on September 4, 1973. During our meeting, Mr. Speer never stated that he was "conciliating" the Dartt charge. Instead, he gave me every indication he was pursuing an ordinary investigation.

Our next meeting was on October 31, 1973. At that time, Mr. Speer informed me that he had conducted interviews with several employees in his investigation of the Dartt charge, and that he felt that he had, in essence, a *prima facie* case against Shell. He then proceeded to outline the various aspects which he believed would create a *prima facie* case in the Dartt charge. At that time, he

asked whether we wanted an opportunity to present evidence in support of our position that no discrimination had occurred, or whether we were interested in settlement. I informed him that I would have to get back to him later as to the position of Shell on either exploring settlement or proceeding with the investigation.

On November 27, 1973, I wrote to Mr. Speer and advised him that we would proceed to compile certain data which he had indicated he would need if we decided not to explore settlement. The studies which Mr. Speer had requested were quite voluminous, and Mr. Speer was aware that it would take several months to complete the compilation of the requested data.

On February 25, 1974, I talked with Mr. Speer and advised him that we were making progress on the compilations and would complete them as soon as possible. Then, on March 18, 1974, Shell received a copy of the Notice of Intent to Sue filed by Ms. Dartt. Shortly thereafter, I met with Mr. Speer, who advised me that he no longer needed the compilations, inasmuch as Ms. Dartt was pursuing a private cause of action. At this same meeting, Mr. Speer advised me that he was no longer acting as an investigator with respect to the charge, but was there solely as a "mediator." He stated that it made no difference to him as to who was right in the dispute, and that anything the parties could agree on was fine with him.

The attitude of Mr. Speer was wholly different in this meeting than in our meeting of October 31, 1973. In the October meeting, Speer had stated that any settlement of the case would need to be acceptable to the Department of Labor and to Ms. Dartt. In the meeting mentioned above, he appeared to be disinterested in how the case was settled. Furthermore, in the October, 1973 meeting, Mr. Speer merely offered Shell the opportunity to explore

settlement of the charge, whereas, in the last meeting, Speer appeared to be actively interested in bringing the parties together without any control by Speer over the terms of the settlement.

I requested that Mr. Speer determine what Ms. Dartt was interested in as a settlement of the case. Mr. Speer telephoned me the next day, April 5, 1974, to inform me of Ms. Dartt's initial demands. I told Mr. Speer that Shell would discuss her offer, and decide whether it would make a counteroffer. Mr. Speer actively encouraged me to consider her offer, and stated he would present any counteroffer to Ms.Dartt.

We later determined that, for a variety of reasons, conciliation should not proceed, and so informed Mr. Speer. Shortly thereafter, the lawsuit by Ms. Dartt was filed.

I have read the above and foregoing statement, consisting of four (4) pages, and it is true and correct to the best of my knowledge and belief.

/s/ Kenneth Jacobs
KENNETH JACOBS

Subscribed and sworn to before me this 28 day of August, 1975.

/s/ Lisa Farrimond
NOTARY PUBLIC

My commission expires:
June 17, 1978

Supreme Court, U. S.
FILED
FEB 5 1977
MICHAEL RODAK, JR., CLERK

PAGE 2

No. 76-678

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

SHELL OIL COMPANY,
Petitioner

v.

ANNE M. DARTT,
Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Attorneys for Petitioner

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 76-678

OCTOBER TERM, 1976

SHELL OIL COMPANY,
Petitioner

v.

ANNE M. DARTT,
Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner has petitioned this Court to review the final judgment of the Tenth Circuit Court of Appeals in the above-styled cause which was entered on August 19, 1976 which

decision reversed a United States District Court decision from the Northern District of Oklahoma. The basis of the District Court's decision was the failure of the respondent to file a Notice of Intent to Sue in accordance with Section 626 (d)(1) of the Age Discrimination Employment Act (29 U.S.C. § 626 (d)(1). The Tenth Circuit reversed the District Court's decision while holding that the Notice of Intent to Sue must be filed before a private action can be maintained but holding that the 180-day time limitation within which the Notice to Sue is required to be filed is subject to equitable tolling and further holding that the respondent's activities in attempting to pursue her remedy through the Labor Department entitled her to equitable relief in the case at bar.

OPINIONS BELOW

The decision of the United States District Court for the Northern District of Oklahoma is reported at_____F. Supp._____10 FEP Cases 844 (N.D. Okla. 1975) (Petitioner's Appendix A, pp. 1a-15a). The opinion of the United States Court of Appeals for the Tenth Circuit is reported at _____F.2d_____, 13 FEP Cases 12 (10th Cir. 1976) (Petitioner's Appendix B, pp. 16a-26a). The Order denying the Petition for Rehearing was not reported. (Petitioner's Appendix C, p. 27a).

JURISDICTION

The Tenth Circuit Court of Appeals decision was filed on July 22, 1976, and, thereafter, a Petition for Rehearing was filed on August 3, 1976, and denied on August 19, 1976.

28 U.S.C. § 1254(1) is the basis for the jurisdiction of this Court.

QUESTIONS PRESENTED

1) Whether the requirement under 29 U.S.C. § 626(d) that the Notice of Intent to Sue be given within 180 days is jurisdictional so as to bar equitable relief to a claimant under proper circumstances.

STATUTES INVOLVED

As the petitioner has stated in its Brief, this case involves the interpretation and application of Section 626 of the Age Discrimination in Employment Act (29 U.S.C. § 626). The text of that statute has been set forth by petitioner's (Appendix D at pp. 29a) and is therefore not repeated here.

STATEMENT OF THE CASE

Respondent filed an action in the United States District Court for the Northern District of Oklahoma against her former employer, the Shell Oil Company, under Section

7(b) of the Age Discrimination in Employment Act of 1967 (hereinafter, the Act or ADEA,[1] and Section 16(b) of the Fair Labor Standards Act of 1938.[2] Plaintiff charged defendant with certain unlawful employment practices based on age, including specifically the act of discharging her in violation of the ADEA. Accordingly, plaintiff sought an injunction in the District Court which would require the defendants to reinstate her, as well as damages which she had suffered by reason of her unlawful discharge together with costs and attorneys' fees.

The United States District Court for the Northern District of Oklahoma held that it lacked subject matter jurisdiction, because plaintiff had not strictly complied with the procedural timetable set out in Section 7(d)(1) of the ADEA with respect to filing a "Notice of Intent to Sue" with the Secretary of Labor "within one hundred and eighty days after the alleged unlawful practice occurred," and dismissed plaintiff's action. In so doing, the District Court also ruled that plaintiff's prompt complaint to the United States Department of Labor, made within nine days of her discharge, even when considered in conjunction with her subsequent

[1] Act of December 6, 1967, Public Law 90-202, 81 Stat. 602, as amended; 29 U.S.C. § 621 *et seq.* The pertinent statutory provisions are set forth, *infra*, pp. 3-6.

[2] Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended; 29 U.S.C. § 201 *et seq.* Section 7(b) of the ADEA [29 U.S.C. § 626(b)] incorporates by reference the civil enforcement provisions of the Fair Labor Standards Act, including Section 16(b) of that act [29 U.S.C. 216(b)].

formal notification, neither satisfied nor tolled the ADEA notice requirement or equitable grounds.

On appeal to the Tenth Circuit Court of Appeals, the Tenth Circuit held that while the Notice of Intent to Sue was required, the one hundred and eighty day limitation period within which the Notice of Intent to Sue was required to be filed was subject to equitable tolling and held that plaintiff's actions entitled her to equitable relief.

STATEMENT OF FACTS

Mrs. Anne M. Dartt was employed by the Shell Oil Company, at its Credit Card Center in Tulsa, Oklahoma, from January 3, 1966 until July 31, 1973 (Cmplt. ¶III and IX, R. 4, 6; Opin., R. 16). At the time of her discharge (Tr. 25, 38), she was 51 years of age and employed as a Senior Credit Analyst (Cmplt. ¶IX, R. 6; Opin., R. 16).

On August 9, 1973,[3] nine days after her termination, Mrs. Dartt visited the Tulsa, Oklahoma office of the Wage and Hour Division, U. S. Department of Labor, and spoke with its Assistant Area Director, Mr. J. Dean Speer (Opin., R. 16; Tr. 33, 45, 88). Mrs. Dartt complained that she had been fired by Shell due to her age (Opin., R. 16-17; Tr.

[3] The court below, based on the mistaken testimony of Mrs. Dartt (Tr. 26, 45, 49-50), used the date September 9, 1973 (Opin., R. 16). The correct date is August 9th (Tr. 90; see also, Tr. 57) as the court apparently recognized during the course of the evidentiary hearings (Tr. 81, 101).

44-45). As she explained to the court below, her belief that she had been unlawfully discharged was based on a statement made to her by her supervisor that she had "no potential because of (her) age" (Tr. 44).

When Mrs. Dartt was at the Wage-Hour office in Tulsa, Mr. Speer "question(ed) her about the facts of the case, * * * made notes (and) fill(ed) out (a Labor Department) internal form indicating the substance of her complaint" (Tr. 116).[4] In addition, he told her that "on the face of it, it appears that you do have a right to complain and I'll investigate and I will let you know" (Tr. 33-34). First, however, because of what Mr. Speer considered to be a good working relationship with the Shell Oil Company (Tr. 110-112, 116-119), he immediately undertook to conciliate the matter (Tr. 92-93). Indeed, as he testified, he called Shell "that very afternoon" (Tr. 112; see also Tr. 33) and informed one of its representatives — a Mr. Frank Thompson — of the receipt of Mrs. Dartt's age discrimination complaint (Tr. 57). The next day, August 10th, this information was relayed by Mr. Thompson to Mr. Kenneth E. Jacobs (Tr. 57), Shell's Manager for Employee Relations (Tr. 53), whose

[4] As Mr. Speer testified, when Mrs. Dartt came in to lodge her age discrimination complaint, a standard compliance file was opened to cover the matter (Tr. 113). Pursuant to subpoena (see R. 2), Mr. Speer brought that file with him to court and used it to "refresh (his) memory" prior to giving testimony (Tr. 113, 119).

equal employment duties with Shell also involve the ADEA (Tr. 54).

"(A)pproximately one week later," Mr. Speer again called Shell, this time speaking with Mr. Jacobs for the purpose of arranging a conference (Tr. 58; also, Tr. 126). The conference was held the following day at Shell's Credit Card Center (Tr. 112; also, Tr. 101). In his discussions with Mr. Speer, Mr. Jacobs learned that Mrs. Dartt had not filed a notice of intent to sue (Tr. 57-58, 127).

On September 4, 1973, Mr. Jacobs addressed a letter to Mr. Speer, enclosing some materials he had requested relating to the employment of Mrs. Dartt and all other employees classified as Senior Credit Analysts as of the date of her discharge (Affidavit of Warren D. Landis (hereinafter, Landis Aff't), *supra*, p. 8n.4, at ¶7). Mr. Speer continued his conciliation effort by meeting with Mr. Jacobs on October 31, 1973 (Landis Aff't at ¶8), but, as he testified, he "was unsuccessful" (Tr. 93, 96). He then assumed an "investigative posture" (Tr. 91). In November 1973, Mr. Speer obtained a promise from Shell that it would "make some internal studies (and) develop some statistical information" as he had requested, but this promise was never kept (Tr. 93-94). See Landis Aff't at ¶9.

As the court below found, Mrs. Dartt called Mr. Speer several times to inquire about the status of the matter (Opin.,

R. 17; Tr. 28, 34-35, 46-47). Each time she was informed that she would be notified as soon as any action was taken (Opin., R. 17; Tr. 34). Unfortunately, however, she was not advised of her private right to bring a civil action under the ADEA or of the 180-day notice requirement during any of her several contacts with Mr. Speer (Tr. 27, 35, 47, 50). One such call was made on January 21, 1974 (*i.e.*, 174 days after her discharge); her last call was made on March 1, 1974 (Landis Aff't at ¶11). Thereafter, on March 5, 1974, Mr. Speer informed Mrs. Dartt by letter that "there will be a delay *in completing* this investigation" and notified her of the private right to sue under the Act (Pltf's Exh. 2, R. 36, emphasis added; see Landis Aff't at ¶12 and Opin., R. 17). Enclosed with the letter was an explanatory pamphlet entitled "Age Discrimination in Employment Act" (Landis Aff't at ¶12; see Opin., R. 17 and Plft's Exh. 2, R. 36), which states in pertinent part:

> Before an individual brings court action, he must give the Secretary not less than 60 days' notice of his intention. This notice must be filed within 180 days of the occurrence of the alleged unlawful practice * * *. The law provides that after receiving such a notice, the Secretary will notify the prospective defendants and try to eliminate any alleged unlawful practice by informal conciliation, conference, and persuasion. [Wage-Hour Publication No. 1230 at p. 4 (1971); quoted in Tr. 69.]

At trial, Mrs. Dartt stated that this constituted her first actual knowledge of her right to maintain a private ADEA

action and of the Act's 180-day notice requirement (Tr. 34, 47; Opin., R. 17). Promptly, therefore, upon receipt of the letter and pamphlet, she contacted and retained private counsel (Opin., R. 17; Tr. 35, 37; see also, Tr. 21). On March 14, 1974 (*i.e.*, 216 days after discharge), her attorney mailed a letter to the Labor Department's office in Tulsa, Oklahoma, for the attention of Mr. Speer, giving notice that Mrs. Dartt intended to commence a civil action under the ADEA against the Shell Oil Company (Exh. A to Cmplt, R. 9).

Based on this formal notification (Tr. 120), and in accordance with internal Labor Department procedures (see Tr. 121-122), Mr. Speer "attempted to reconciliate or get back into the conciliation procedure under our responsibilities when we receive Notice of Intent to Sue" (Tr. 93). Thus, on March 15, 1974, Mr. Speer sent out two letters: one to Mrs. Dartt's attorney, acknowledging receipt of the notice of intent to sue; and the other to Shell's Manager for Employee Relations, informing him of the receipt of Mrs. Dartt's notice of intent to sue (Landis Aff't at ¶14 and 15). Each letter also outlined the Labor Department's procedures for attempting to conciliate and settle the matter *(ibid.)*. Thereafter, following conversations with Mrs. Dartt regarding terms of settlement agreeable to her, Mr. Speer met with Shell's Manager for Employee Relations to discuss the possibility of mediating or settling Mrs. Dartt's age discrimination complaint (Landis Aff't at ¶16). Again, on May 14, 1974, Mr.

Speer talked with Shell's Employee Relations Manager as to the possibility of settling the matter (Landis Aff't at ¶17). This second conciliation effort also "proved unsuccessful" (Tr. 93). Therefore, by letter dated May 16, 1974, Mr. Speer notified Mrs. Dartt's attorney that attempts to conciliate her complaint had been unsuccessful and that she was free to take whatever action she thought advisable (Landis Aff't at ¶18).

This ADEA action was filed by Mrs. Dartt's attorney on May 21, 1974 (Cmplt., R. 4); that is, more than 60 days after giving formal notice of an intent to sue the Shell Oil Company. The complaint sought an injunction requiring defendant Shell to reinstate plaintiff Dartt in its employ, and the recovery of sums due plaintiff by reason of her unlawful discharge, together with costs and attorney fees (Cmplt., R. 8). On June 11, 1974, defendant filed a motion to dismiss for failure to state a cause of action (R. 12-14).

In order to develop the facts necessary to resolve the questions raised by defendant's motion to dismiss, the district court held two evidentiary hearings (see Opin., R. 16). The principal witnesses were plaintiff Dartt (Tr. 24-52), defendant's Manager for Employee Relations, Mr. Jacobs (Tr. 53-62), and Mr. Speer from the Labor Department (Tr. 87-129). The latter's testimony was generally limited to questions concerning the timing of Mrs. Dartt's discrimination complaint and her notice of intent to sue. On February 6, 1975, the District court granted defendant's motion to dismiss (R. 15).

In dismissing the action, the District court ruled that it lacked subject matter jurisdiction because the plaintiff had not strictly complied with the procedural timetable set out in Section 7(d)(1) of the ADEA for notifying the Secretary of Labor of an intent to sue "within one hundred and eighty days after the alleged unlawful practice occurred." It also held that timely filing of the required notice was a jurisdictional prerequisite to the maintenance of a private ADEA action (Opin., R. 18-20). (Petitioner's Brief — Exb. A pp. 1a-15a)

The court further ruled that plaintiff's age discrimination complaint — although made to the local Labor Department Wage-Hour office shortly after her discharge — technically did not satisfy the ADEA Section 7(d)(1) requirement that a "notice of intent to sue" be filed with the Secretary of Labor. Describing the pertinent statutory language as clear and unambiguous, the court held that it was without authority to accept a mere complaint in satisfaction of the formal notice mandated by the Act (Opin., R. 20-23).

Finally, the lower court declined to view Mrs. Dartt's formal notification as relating back to the original filing of

her complaint. Instead, it construed Section 7(d)(1) so strictly as to defeat any and all of the equitable grounds offered by plaintiff for tolling the 180-day notice requirement. Thus, despite the fact that the defendant — well within the 180-day period — had received actual notice and an opportunity to conciliate the asserted violation, the court ruled that the purposes of the Act had somehow not been satisfied (Opin., R. 23-28).

Respondent's Complaint was dismissed by the District Court on February 6, 1975, and respondent thereafter perfected her appeal to the Tenth Circuit Court of Appeals, and on July 22, 1976, that Court entered an order reversing the judgment of the District Court and holding that plaintiff's actions in attempting to promptly pursue her remedy under the ADEA had resulted in the *de facto* fulfillment of the main purposes of the Act and held the time limitation (180 days) was tolled until the filing of respondent's Notice of Intent to Sue.

REASONS FOR DENYING THE WRIT

A. The Decision of the Tenth Circuit Court presents no clear conflict with the other Circuits

The purported differences in the holdings of the several Circuit Courts which have interpreted the 60 day notice requirement of intent to sue under the ADEA are more imag-

ined than real. A close examination of them will reveal they do, in fact, recognize the very principle on which the Tenth Circuit of Appeals decided the case. Thus, the ultimate inquiry in each instance is: Do the facts of the case warrant equitable relief?

In considering this question, it is proper to look to those decisions decided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. As the Courts have uniformly recognized, the ADEA was in substantial part patterned after Title VII of the Civil Rights Act of 1964.[5] For instance, the ADEA's 180 day notice provision is very similar to the provision in Title VII which requires that "a charge . . . be filed (with the Equal Employment Opportunity Commission) within 180 days after the alleged unlawful employment practice occurred."[6]

Petitioner cited the case of *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir. 1974) for the proposition that the 60-day Notice of Intent to Sue requirement is jurisdictional. In this *Powell* case, as in others cited by petitioner, it is true that the Court has loosely used the word "jurisdictional" in speaking of this requirement. The case did hold that filing the Notice of Intent to Sue is a pre-

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[5] *Laugesen v. Anaconda Co.*, 510 F.2d 307, 311 (6th Cir. 1975); *Goger v. H. K. Porter Co., Inc.*, 492 F.2d 13, 15 (3rd Cir. 1974); *Hodgson v. First Federal Savings & Loan Association of Broward County, Florida*, 455 F.2d 818, 820 (5th Cir. 1972).

[6] 42 U.S.C. § 2000e-5(e).

requisite to the right to file any suit whatsoever under the ADEA. This is in line with the holding of the Tenth Circuit and the other decisions as well. It does not follow, however, that the 180-day limitation within which the Notice of Intent to Sue must be filed is also jurisdictional. In the *Powell* case, the claimant was specifically advised to note the specific time limits governing the circumstances under which she could file her own suit. This was some eleven (11) days after the alleged discrimination occurred. She was again informed of her rights on June 12, 1970, which was some four months after the act of discrimination. The existence of specific time limitations in connection with private lawsuits was at that time reiterated to her, together with the fact that nothing done by her to that point was considered to be notice of her intent to file suit. The Fifth Circuit merely held that under those circumstances, since she was expressly alerted to the time limitation for possible action, both private and agency assisted, the time limitation would not be tolled. In other words, they resolved a fact question against the claimant holding that the circumstances did not entitle her to equitable relief.

The Fifth Circuit Court of Appeals having recognized in *Hodgson v. First Federal Savings & Loan Association of Broward County, Florida*, 455 F.2d 818 (5th Cir. 1972), the similarity between the ADEA and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, has shed light on this

question in the late case of *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975). In that case, the Court was concerned with the 90-day period (now 180 days) for filing a charge of employment discrimination with the Equal Employment Opportunity Commission, and they there held that this statute did not begin to run until facts that would support a charge of discrimination were apparent or should have been apparent to a person with reasonably good regard for his rights, similarly situated to the plaintiff. In that case, an employee was fired and a spurious reason for her dismissal was given. It was not until some time later that she discovered the true reason for her dismissal, during which time the 90-day period had run.

The Court in *Reeb*, commented on the conceptual confusion that had arisen from the use of the word "jurisdictional" by the Courts while proceeding to apply equitable considerations to the statutes of limitations. The Court cited *Culpepper v. Reynolds Metal Co.*, 421 F.2d 888 (5th Cir. 1970) where it was held that the use of grievance procedures by an employee under a labor contract tolled the 90-day provision, even though they spoke of it as a "jurisdictional requirement." Holding further from the *Culpepper* case, the Court said, "The timing provisions will be subject to the same sort of equitable modifications that are applied to statute of limitations with the important additional requirement that these modifications will be applied in the interest

of effectuating the broad remedial purposes of the statute. Thus, even in circumstances where a modification might be denied application at the common law, the modification might still be applied if the Court felt that doing so would further the purposes of the statute considered as a whole."

The Court in *Reeb* went on to point out that in the *Culpepper* case it might be said that the plaintiff elected an alternative remedy and might have been denied the benefits of tolling at common law on that ground, but that the Court in *Culpepper* justified applying the equitable modification on the basis of the "great emphasis on Title VII on private settlement and the elimination of unfair practices without litigation."

The Court in *Reeb* further went on to hold that the ratio decidendi of the leading cases dealing with time requirements, in general, under the Act (Title VII) compelled the conclusion that the 90-day requirement was not jurisdictional in the sense that compliance with it vel non determines the jurisdiction of the District Court without respect to any of the other circumstances in a particular case. They held to the view that the requirement should be analogized to statutes of limitations, and that equitable modification such as tolling and estoppel are to be applied to them.

Cited also in the *Reeb* case were *Love v. Pullman Co.*, 404 U.S. 522, 92 S. Ct. 616 and 30 L. Ed. 2d 679 (1972), which

held that a notice filed with the EEOC without first filing with the state agency could be held in abeyance and considered after the state court had declined to take action thus indicating a liberal construction of the statute and thus establishing the time limitations for filing a complaint to be directory rather than mandatory. The *Reeb* Court went on to point out that remedial legislation such as Title VII of the Civil Rights Act of 1964 is entitled to the benefit of liberal construction.

In *Ott v. Midland-Ross Corp.*, 523 F.2d 1364 (6th Cir. 1975), the Court took note of 29 U.S.C. §626(b) and (c) where the Act specifically confers jurisdiction on the Court "to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Chapter." The Court in this case granted equitable relief on the basis that the respondent had practiced fraud on the plaintiff in inducing him to give up certain rights under the Act.

The case of *Hiscott v. General Electric Co.*, 521 F.2d 632, (6th Cir. 1975), tactitly recognized that equity might be applied where appropriate but called attention to the fact that the Labor Department had by its letter, informed the claimant that the fact that he had submitted information concerning an alleged unlawful practice to their agency was not considered notice of intent to sue. Furthermore, the Court found that as no notice of an intent to sue was ever

given before suit was filed, it was immaterial to determine when the 180-day period within which it was to be given should begin to run.

So too in *Eklund v. Lubrizol Corp.*, 529 F.2d 247 (6th Cir. 1976), the Court after considering the case concluded as follows:

> "For the reasons enumerated, we do not believe that the facts of this case warrant equitable relief for appellant."

The Court in *Eklund* thus recognized that equitable relief could be proper in certain circumstances. One of the three Circuit Judges dissented, pointing out that in his view, *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1975) (cited by the majority), did not hold the requirements of Section 626(d) to be jurisdictional in the sense that noncompliance with them would deprive a Court of its power to entertain a suit. The dissent further pointed out that although compliance with these notice requirements is a statutory prerequisite to bringing suit, an exceptional case meriting equitable relief is presented where a claimant can show proper circumstances. The dissent went on to state, "The Act should not be construed to make it a trap for the unwary, nor should it require every claimant to retain counsel experienced in the technicalities of age discrimination litigation."

In *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975), there was a fact question involved as to just when the

employee was discharged. The claimant therein was notified on November 12, 1973, that she no longer had a job but was not administratively terminated until November 30, 1973, having not worked after November 16, 1973.

In making the determination of when her discharge occurred and in applying equitable principles so as to bring her within the statute, the Court stated:

> "The Age Discrimination Act is remedial and humanitarian legislation. It is to be construed liberally to achieve its purpose of protecting older employees from discrimination.[7] A procedural requirement of the Act of doubtful meaning in the given case should not be interpreted to deny an employee a claim for relief unless to do so would clearly further some substantial goal of the Act." Id./914-915

The Court went on to point out that the interpretation urged by respondent would not "further some substantial goal of the Age Discrimination Act" and held that the 180-day notice requirement was intended to serve the purposes of the Act by insuring that the Secretary of Labor is called in for conciliation purposes.

The Third Circuit in *Goger v. H. K. Porter Company, Inc.*, 492 F.2d 13 (3rd Cir. 1974), applied equitable principles to excuse the claimant's failure to file her complaint with the state agency before filing with the Labor Department,

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[7] *Woodward v. Kinney Shoe Corp.*, 369 F.Supp. 911 (N.D. Ga. 1973)

since there were no cases construing the Act to that point and in view of the remedial purposes of the ADEA.

And in another ADEA case, *Skoglund v. Singer Co.*, (U. S. D. C., N.H. 1975) the Court held that claimant's failure to file a Notice of Intent to Sue within 180 days was not jurisdictional and could be excused on equitable principles. In so doing, the Court stated:

> "Remedial legislation should not be so narrowly read as to preclude achievement of its purpose; form should not be raised over substance.
>
> "Limitations which would take away a right from one for whom the statute was enacted have been required to be express and not subject to varying interpretations."[8]

The Court went on to hold that in a statutory scheme in which lay persons are expected to enforce their statutory rights, technicalities are not appropriate. The Court then cited *Love v. Pullman*, 404 U.S. 522, 527 92 S.Ct. 616, 619, 30 L.Ed. 2d 679 (1972), where the Court in considering the procedural technicalities of Title VII stated:

> "Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."

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[8] *Woodford v. Kinney Shoe Corp.*, 369 F.Supp. 911, 914 (N.D. Ga. 1973) Cf. *Evans v. Sheraton Park Hotel*, 164 U.S.App.D.C. 86, 503 F.2d 177 (1974); *EEOC v. Wah Chang Albany Corp.*, 499 F.2d 187 (9th Cir. 1974); *Sanchez v. Standard Brands, Inc.* 431 F.2d 455 (5th Cir. 1970)

The Court further pointed out that there was no indication from the words of Section 626(d) that the 180-day notification requirement was "jurisdictional" in the sense that compliance with it or lack thereof determines, without regard to other circumstances, the jurisdiction of a Federal Court. In closing, in the *Skoglund* case, the Court stated:

> "As noted above, ADEA is remedial legislation. It is therefore entitled to a broad reading. It creates rights in a class of employees, the elderly employed, and it places a burden on employers to inform that class of their rights."

Lately in *Rucker v. Great Scott Supermarkets*, 528 F.2d 393 (6th Cir. 1976), the claimant gave the Secretary of Labor only two-days notice of intent to file suit. Here, again, the Court held that the Notice of Intent to File Suit is a jurisdictional prerequisite but even there observed that such action could not be held to be compliance "absent of showing of special facts warranting granting of equitable relief." While it is true in this case that the Court did hold that the 60 day Notice of Intent to Sue is jurisdictional, it did not hold that the failure to file it withn 180 days would require dismissal of the claimant's suit and recognizes equitable principles could apply. Once again, in a dissenting opinion, Circuit Judge McCree stated his feeling that in the proper case "substantial compliance" with the statutory preconditions to suit would be sufficient.

A close reading of the cases cited above reveals that they considered equitable relief to be appropriate in each case and either denied it or granted it depending upon whether the claimant was entitled to such relief under the facts of the particular case. The Tenth Circuit gave as reasons for its opinion: (1) The similarities between Title VII and the ADEA and (2) the liberal reading of analogous time limitations in Title VII, (3) the overly broad usage of the term "jurisdictional" by Courts interpreting Section 626(d) of the ADEA, (4) the remedial nature of the legislation, (5) the lack of legal training and guidance for many of the ADEA complainants. This constituted a very sound basis considering the nature, history and purpose of the Act. The Secretary of Labor has stated in his brief Amicus Curiae that one-half of the cases filed under the ADEA have been dismissed on procedural grounds with one-third being dismissed because the 60-day Notice of Intent to Sue required to be filed within 180 days.

Thus, since the Circuit Courts are in accord in principle there remains no compelling reason to grant the writ sought by petitioner, Shell Oil Company. Writs of Certiorari should be sparingly granted.[9] It is not a matter of right but of sound judicial discretion.[10]

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[9] *Rice v. Sioux City Cemetery*, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614

[10] Rule 19 S.Ct.

Certiorari is granted only in case involving principles, the settlement of which are of importance to the public as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Courts of Appeals.[11]

CONCLUSION

The purposes of the 180-day notice requirement in giving the Secretary of Labor an opportunity to achieve conciliation and giving the employer notice of a possible suit have been amply fulfilled in the present case as was held by the Tenth Circuit. No prejudice has resulted to the defendant. The case fairly cries out for equity. The decision of the Tenth Circuit is not only correct but presents no real conflict with the other Circuit Courts which have decided the question or which would justify the granting of the writ sought. The writ should be denied.

Respectfully submitted,

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[11] *Rice v. Sioux City Cemetery*, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614; *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 95 L.Ed. 479, 71 S.Ct. 453.

NO. 76-678

Supreme Court, U. S.
FILED
MAY 6 1977
MICHAEL RODAK, JR., CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1976

SHELL OIL COMPANY,
Petitioner

v.

ANNE M. DARTT,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

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NO. 76-678

In The Supreme Court of the United States

OCTOBER TERM, 1976

SHELL OIL COMPANY,
Petitioner

v.

ANNE M. DARTT,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 539 F.2d 1256, (A. 26-36).[1] The Order of the Court of Appeals denying the Petition for Rehearing is not reported (A. 37). The opinion of the District Court is not officially

[1] References to the Appendix are designated as (A. (page)).

reported, but is unofficially reported at 10 FEP Cases 844 (N.D. Okla. 1975) (A. 10-25).

JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1976. A timely petition for rehearing was denied on August 19, 1976, and the petition for certiorari was filed on November 15, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether timely compliance with the notice-of-intent-to-sue requirement of 29 U.S.C. § 626(d) is a substantive jurisdictional prerequisite to suit.
2. Whether the time for compliance with the Section 626(d) jurisdictional prerequisite may not be judicially extended under circumstances which would not toll an ordinary statute of limitations.
3. Whether the Court of Appeals improperly intruded upon the discretionary powers of the District Court, by overturning its finding that the relative equities did not warrant any tolling of the Section 626(d) limitations period.

STATUTES INVOLVED

This case involves the interpretation and application of Section 626(d) of the Age Discrimination In Employ-

ment Act (29 U.S.C. § 626(d)). The text of that statute is set forth below:

> (d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed —
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.

STATEMENT OF THE CASE

A. THE FACTS

The Respondent, Mrs. Dartt, was employed by the Petitioner, Shell Oil Company, on January 3, 1966, at which time she was forty-four years old (A. 2, 4). Mrs. Dartt was terminated on July 31, 1973, and was fifty-one years old at the time of her termination (A. 2, 46).

Mrs. Dartt believed that her termination was due to her age (A. 46, 47), and she immediately contacted an

attorney who was a member of a club to which she belonged (A. 48). This attorney referred her to another attorney, who advised Mrs. Dartt that she "needed to file with the Federal Wage and Hour people and not with an attorney at that time." (A. 48).

Mrs. Dartt then decided to go to the U.S. Department of Labor, Wage and Hour Division, to register her complaint (A. 42). Her stated reason for so doing was:

> I thought that the Department of Labor would take care of everything and I frankly thought an attorney would be an added expense and if the Department of Labor would handle it, why bother with an attorney. (A. 44).

Mrs. Dartt met with J. Dean Speer, Assistant Area Director of the local Wage and Hour Office on August 9, 1973, at which time she registered an oral complaint of age discrimination (A. 42, 53). Mr. Speer contacted Shell officials shortly thereafter, and advised them that Mrs. Dartt had made a complaint, but had not filed a Notice of Intent to Sue (A. 50).

Mr. Speer conducted a preliminary investigation of the allegations by Mrs. Dartt during September and October of 1973 (A. 77, 81). After deciding that the complaint had possible merit, Mr. Speer had a meeting with Shell officials to determine whether Shell wished to explore possible settlement or respond to the allegations of the

charge (A. 77, 81, 82). Shell advised Mr. Speer that it would get back to Mr. Speer on its position (A. 82).

On November 27, 1973, Shell wrote to Mr. Speer and advised him that it believed that Mrs. Dartt was lawfully terminated and that it was, therefore, not interested in exploring settlement at that time (A. 77, 82). Shell then agreed to undertake the compilation of voluminous statistical data on its "employment, transfer, promotion, and performance appraisal policies and practices." (A. 55, 77, 82). Mr. Speer had previously told Shell officials that these compilations would be necessary if the case was not settled (A. 55, 82).

During the time that Shell and the Department of Labor were engaging in these preliminary discussions, Mrs. Dartt telephoned Mr. Speer on two or more occasions to check on the status of her case (A. 77). Mr. Speer advised Mrs. Dartt that the investigation might take as long as a year, but that he was working on the case and would let her know about any developments (A. 43).

After the November 27, 1973, letter, Shell proceeded with the compilations, and contacted Mr. Speer on February 25, 1974, to advise him that progress was being made on the compilations, which would be completed as soon as possible (A. 82). While Shell was engaging in making these compilations, Mrs. Dartt contacted Mr. Speer on three more occasions to inquire as to the status of her case (A. 78). Mr. Speer continued to advise her that he was working

on her case, but that the investigation had not been completed (A. 43).

During this seven month period, in which Mrs. Dartt had at least six contacts with Mr. Speer, she never made any inquiry as to what her rights were under the A.D.E.A. (A. 49). She never asked any questions as to the necessary procedures for protecting her rights under the Act, nor did she inquire as to whether she could dispense with the efforts of the Department of Labor and bring her own suit (A. 49). According to Mrs. Dartt:

> Since he [Mr. Speer] told me it might take a year for his investigation, I didn't worry about it. I didn't even try to find out anything else (A. 47).

Mr. Speer treated the oral complaint by Mrs. Dartt as a request to activate the investigative efforts of the Department of Labor on her behalf (A. 53-57). He did not consider her oral complaint to be a Notice of Intent to Sue (A. 57, 65), and did not so treat it during his processing of her complaint (A. 53-55, 69).

On March 5, 1974, Mr. Speer wrote a letter to Mrs. Dartt, which stated that there would be a delay in completing the investigation and advising Mrs. Dartt that:

> In view of this delay and to avoid any misunderstanding, your attention is again called to page 4 of the enclosed pamphlet. As you will note, there are certain requirements with specific time limits governing the circumstances under which an employee may file his own suit. The fact that you submitted information concerning an alleged unlawful practice has not been considered a notice to the Secretary of Labor of intent to file suit (A. 69).

Page 4 of the enclosed pamphlet set forth the fact that a Notice of Intent to Sue had to be filed within 180 days after the alleged unlawful practice occured (A. 74). Mrs. Dartt testified that, when she received the letter, this was the first time that she became aware of the Notice of Intent to Sue requirement (A. 41). Mr. Speer testified that he did not remember whether or not he had informed Mrs. Dartt of the Notice requirement, but that it was his usual practice to inform complainants about it. He admitted that he might have forgotten to inform Mrs. Dartt of the requirement in his haste to see if the charge could be resolved (A. 63).

Mrs. Dart then contacted her present attorney, who advised her that she had missed the time limit, but that a Notice should be filed because she was not "aware of what was going on." (A. 45). A Notice of Intent to Sue was thereafter filed by Mrs. Dartt on or about March 14, 1974 (A. 7). This Notice was filed 216 days after the allegedly unlawful termination of Mrs. Dartt. At the subsequent hearings held on the Motion to Dismiss filed by Shell, counsel for Mrs. Dartt stipulated that Mrs. Dartt was not relying on her prior oral complaint as fulfilling the Notice of Intent to Sue requirement (A. 38-39, 51, 52).

Mr. Speer received the Notice and processed it, becaue he had been given instructions not to take any position on timeliness (A. 66). He contacted Shell officials and actively pursued the possibility of settlement (A. 55, 82-83).

These conciliation efforts proved unsuccessful, and Mr. Speer so notified Mrs. Dartt (A. 55).

On May 21, 1974, Mrs. Dartt filed suit against Shell, pursuant to the A.D.E.A. provisions making it unlawful to discriminate against employees aged 40 to 65 because of their age (A. 2-7). In the meantime, the Department of Labor kept its investigation on Mrs. Dartt open, but in abeyance, due to the pending litigation by Mrs. Dartt (A. 55, 67).

B. DISTRICT COURT PROCEEDINGS

Shell moved to dismiss the suit by Mrs. Dartt on the grounds that Mrs. Dartt had failed to state a claim upon which relief could be granted, because it appeared on the face of her complaint that she had not timely complied with the Notice of Intent to Sue requirement of Section 626(d) (1) (A. 8-9). Mrs. Dartt responded by arguing that the Section 626(d) requirement was merely directory, and not jurisdictional; that her oral complaint satisfied the Section 626(d) requirement; and that, if her oral complaint did not satisfy the requirement, the requirement should be tolled due to the failure of the Department of Labor to inform her of the requirement.

The District Court held two evidentiary hearings in order to develop the facts material to the jurisdictional challenge. After the conclusion of these hearings, the District Court issued an opinion, holding that timely com-

pliance with the notice requirement was a "jurisdictional prerequisite" to the maintenance of a private suit under the A.D.E.A. (A. 13-15). The Court noted that the use by Congress of the mandatory word "shall" evidenced a clear Congressional intent that timely compliance with Section 626(d) was an essential precondition to suit (A. 14). The Court observed that the statutory language was plain and unambiguous, and held that "it must be given effect according to its plain and obvious meaning." (A. 15).

The District Court further held that the oral complaint by Mrs. Dartt to the Department of Labor did not satisfy the Section 626(d) requirement (A. 15-18). The Court noted that, under the original House-passed bill, there was no 180-day requirement. However, the original Senate version contained such a 180-day requirement, and the Senate restored that requirement when it considered the House-passed version (A. 17). The District Court concluded that the legislative history indicated that Congress attached "significant importance" to compliance with the 180-day requirement (A. 18). The District Court further found that, under the statutory procedures of the Act, mere use of the investigative aid of the Department of Labor by Mrs. Dartt would not reasonably put Shell or the Department on notice that she intended to bring a private suit (A. 17). According to the Court:

> It does not appear that under the provisions of these statutes the commencement of an investigation by the

> Department of Labor would effectively notify an employer that an employee intended to bring a civil action under the ADEA. Thus to hold that a mere filing of a complaint with the Department satisfies the notice requirement of 29 U.S.C. § 626 (d) thwarts one of the basic purposes of that section that a potential defendant become aware of its status and the possibility of litigation reasonably soon after the alleged discrimination (A. 17).

Finally, the District Court held that the failure of the Department of Labor to inform Mrs. Dartt of the notice requirement when she registered her oral complaint did not toll the time for compliance with the notice requirement. The Court premised its holding on three separate grounds.

The first basis for this holding was that Mrs. Dartt was not excusably ignorant of the notice requirement. The Court found that Mrs. Dartt was charged with presumptive knowledge of the statute (A. 19, 23). In addition, the Court found that she had constructive knowledge of the statute from the posters displayed by Shell on its bulletin boards, and was possessed with enough information to cause a reasonable person to inquire as to their rights (A. 19, 23; 68). Finally, the Court found that the failure of the Department of Labor to inform Mrs. Dartt of the notice requirement did not prevent her from fulfilling the requirement (A. 23). In the view of the Court, the Department of Labor had no statutory duty to inform Mrs. Dartt of the notice requirement, and its failure to do so did not relieve Mrs. Dartt of

the duty to make a reasonable inquiry as to what was necessary to preserve her rights (A. 23).

The second basis for this holding was that the use by Mrs. Dartt of the administrative complaint procedures under the A.D.E.A. was permissive (A. 19). The Court held that Mrs. Dartt could not rely on her use of a permissive administrative remedy to toll the time limits of Section 626(d), especially where her use of that remedy did not put Shell on notice that she intended to pursue another, independent remedy (A. 19-23). The Court rejected the argument by Mrs. Dartt that her oral complaint gave Shell sufficient notice to bring her action within the tolling principles enunciated by this Court in *Burnett v. New York Central R.R. Co.*, 380 U.S. 424 (1965), stating:

> The fact that the plaintiff commenced action in a court of competent jurisdiction and served defendant with timely notice was central to the *Burnett* decision. There was no such comparable action herein by which Defendant was notified of an action against it. The rationale of *Burnett* is therefore inapplicable to this case (A. 23).

The third basis relied upon by the Court in refusing to toll the notice requirement was that Mrs. Dartt had failed to show that the relative equities were clearly in her favor (A. 23). The Court found that the strong remedial policies underlying the A.D.E.A. were equally balanced by the strong Congressional intent that employers receive a clear and timely notice that they will be sued (A. 23). Because

one statutory purpose did not outweigh the other, the Court held that the balance could not be tipped by Mrs. Dartt if her actions would not have tolled a statute of limitations in a parallel situation (A. 23).

The Court found that the facts warranted a conclusion that Mrs. Dartt was not excusably ignorant of the requirement, and that insufficient equities existed to warrant a tolling, particularly as Mrs. Dartt would not be left without a remedy (A. 23). The Court noted that Mrs. Dartt could still obtain relief through the Department of Labor, and held that it would be "just" to leave her to the remedy which she had elected to pursue (A. 23).

As a result, the District Court entered an Order on February 6, 1975, dismissing the action for lack of subject matter jurisdiction, and Mrs. Dartt took a timely appeal from that Order.

C. THE COURT OF APPEALS OPINION

On July 22, 1976, the Court of Appeals reversed the dismissal of the action, and remanded the case for trial. The Court of Appeals agreed with the District Court that the oral complaint by Mrs. Dartt did not satisfy the notice requirement (A. 29). The Court of Appeals further agreed with the District Court that timely compliance with the notice requirement should not be excused, absent clear equities in favor of Mrs. Dartt (A. 33). However, the Court of Appeals disagreed with the conclusion by the District

Court that the relative equities did not warrant any tolling of the notice requirement (A. 33).

The Court of Appeals acknowledged that one of the basic purposes of the Section 626(d) requirement is "to give early notice to the employer of a possible lawsuit." (A. 35). However, the Court of Appeals believed that the "*de facto*" purpose of the statute was fulfilled by the oral complaint registered by Mrs. Dartt, because this oral complaint gave Shell "early notification of Dartt's allegations." (A. 35). The Court of Appeals viewed as immaterial the fact that not only did the oral complaint never contain any mention of a possible private suit, but also the fact that the Department of Labor told Shell that no Notice of Intent to Sue had been filed by Mrs. Dartt.

Finding that early notification of allegations of age discrimination (without any early notice of possible suit) was sufficient to satisfy the Congressional purpose behind Section 626(d), the Court of Appeals then listed several other equitable factors which, in its view, supported an equitable tolling of the notice requirement. These included the fact that Mrs. Dartt promptly sought legal advice from two attorneys and followed it (A. 36); the fact that the Department of Labor failed to tell Mrs. Dartt about the notice requirement (A. 35);[2] the fact that Shell allegedly indirectly contributed to the failure of Mr. Speer to

[2] The Court of Appeals acknowledged that there was no statutory duty to do so (A. 35).

tell Mrs. Dartt about the requirement (A. 35);[3] and the fact that Mrs. Dartt checked on the status of her complaint about once per month (A. 34).

The Court of Appeals rejected the finding of the District Court that Mrs. Dartt had both presumptive and constructive knowledge of the Section 626(d) requirement, and likewise rejected the finding of the District Court that Mrs. Dartt had not acted reasonably in her failure to inquire into her rights. In the view of the Court of Appeals, the actions taken by Mrs. Dartt were reasonable and her ignorance of the law excusable (A. 36).

The Court of Appeals therefore found that the 180-day limit was indefinitely tolled (past the time when Mrs. Dartt consulted her first attorney and the Department of Labor and past the time when she received actual notice of the 180-day requirement) until Mrs. Dartt filed her Notice of Intent to Sue (A. 36). Shell timely sought certiorari from this Court, and certiorari was granted on February 22, 1977.

SUMMARY OF ARGUMENT

A. Congress established a comprehensive and definite

[3]The Court of Appeals seems to have inferred that Shell acted unreasonably with regard to the speed with which it completed the requested compilations. However, Mr. Speer testified that he was "awaiting the information *at the time*" he wrote Mrs. Dartt (A. 56), but he never testified that the delay in obtaining the data caused him to delay his letter to Mrs. Dartt.

scheme for the enforcement of rights under the A.D.E.A. and has defined with precision the requirements necessary for the maintenance of a private civil action. Section 626 (d) is clear and unequivocal in its specification that a Notice of Intent to Sue must be filed within one hundred and eighty days after the occurrence of the alleged unlawful practice, as a condition precedent to the maintenance of any private action. Both the language of the A.D.E.A and its legislative history demonstrate Congressional concern for a prompt and specific filing period, in order to give respondents and the Department of Labor prompt notice of possible private litigation and thereby promote effective, accelerated settlement of the claims of prospective private litigants. Congress accomplished its objectives by enactment of the 180-day Notice requirement, and made it clear that alternative actions by a plaintiff which failed to convey any notice of intent to maintain a private suit could neither fulfill this requirement nor extend the time for fulfilling the requirement. Because timely compliance with the Section 626(d) Notice requirement is a substantive jurisdictional prerequisite, the time for compliance with that requirement may not be judicially extended through the use of the doctrine of equitable tolling.

B. Legal precedent does not support the engrafting of exceptions upon the 180-day Notice requirement for plaintiffs who register oral complaints with the Department of Labor within the 180-day period. Assuming *arguendo* that

Section 626(d) is analogous to a statute of limitations, the equitable doctrine of tolling provides no basis for allowance of tolling under the circumstances presented in the instant case. The equitable doctrine of tolling was developed in order to avoid injustice in circumstances where a person is prevented from exercising his rights, through no fault of his own, due to actions by the defendant; or, a recognized legal disability; or by operation of law. At no time in the case at bar was Mrs. Dartt prevented or hindered in any way by Shell Oil Company from timely filing her Notice of Intent to Sue. Her ignorance of the law is no excuse, because she is undisputedly a person of ordinary mental capacity, suffering under no legal disability which would render her incompetent to protect or assert her own rights. Established legal principles charge her with presumptive knowledge of the contents of the statutes, and require her to take reasonable steps to inquire into and protect those rights. Her failure to take the necessary steps to protect her rights must be held to be fatal to her action.

Furthermore, Mrs. Dartt was not prevented by operation of law from timely filing her Notice of Intent to Sue. The A.D.E.A. does not require the registering of an oral complaint with the Department of Labor as a precondition to the filing of a Notice of Intent to Sue. Persons who register such complaints are not prevented from meeting the Section 626(d) requirements during the pendency of their oral complaints. Under the enforcement scheme of

the A.D.E.A., persons are free to pursue either their administrative remedy by registering a complaint or their judicial remedy by filing a Section 626(d) notice, or both. This Court has repeatedly held that no tolling of a limitations period is warranted where a plaintiff has an unfettered right to invoke a certain remedy, but chooses not to do so while pursuing other separate remedies. Because the registering of an oral complaint is an optional A.D.E.A. remedy which does not bar timely compliance with Section 626(d), no tolling of the Section 626(d) notice period is allowable during the pendency of such complaints.

Finally, oral complaints to the Department of Labor within the limitations period are insufficient to warrant the invocation of the tolling principle enunciated by this Court in *Burnett v. New York Central R.R. Co.*, 380 U.S. 424 (1965). The *Burnett* tolling principle is limited in application, and may only be utilized where a plaintiff gives notice to the defendant, within the time and in the manner contemplated by the statute, that suit will be maintained against it. Oral complaints are insufficient to give the notice required by Section 626(d), because such complaints neither convey the required intent to maintain a private civil action nor are they in the written form mandated by Congress. Extension of the *Burnett* tolling principle to situations where no statutory notice is given would do violence to both the rationale upon which *Burnett* is predicated and to the statutory language of Section 626(d).

C. It is the function of the district court, sitting in equity, to exercise its sound and reasoned discretion, with due regard to the law and the facts, and to fashion a just result. The Courts of Appeals are limited in their review of an exercise of discretion by a district court, and may only overturn the decision of the lower court where there has been an abuse of discretion.

The decision of the District Court was supported by both the law and the facts; it gave full effect to the statutory language of Section 626(d); it prevented prejudice to Shell and the Department of Labor due to the untimely notice; and, it left Mrs. Dartt with a Congressionally approved remedy for her alleged injury. The Court of Appeals improperly engaged in a *de novo* review of the facts of the case, and substituted its discretion for that of the District Court. This was an impermissible exercise of the power of appellate review, and must be overturned.

ARGUMENT

I.

CONGRESS INTENDED THAT SECTION 626(d) BE STRICTLY ADHERED TO BY THE JUDICIARY.

The central question presented in this case is what type of notice Congress intended to be given to a defendant in order to satisfy the requirements of Section 626(d). Companion to that issue is whether, even if the required notice is not given, alternative actions by a plaintiff may extend the time for giving the required notice.

The Court of Appeals found that the *de facto* purposes of the Notice of Intent to Sue requirement are fulfilled when a plaintiff registers an oral complaint of age discrimination with the Department of Labor within the limitations period. The Court of Appeals further found that, where the *de facto* purposes of the A.D.E.A. are fulfilled, the time limits for formal compliance with the Notice of Intent to Sue requirement may be extended indefinitely.

Shell submits that the language of the statute, its legislative history and substantial legal precedent mandate a conclusion that the *de facto* purposes of Section 626(d) can only be satisfied by an actual notice of intent to sue filed within the 180-day limitation period and that oral complaints may not extend that filing period. Failure to give such a Notice, within the time required, is fatal to the action.

A. The Clear And Unambiguous Language Of Section 626(d) Must Be Given Effect According To Its Plain And Obvious Meaning.

It is a well-settled principle of statutory construction that when statutory language is clear and unambiguous, it must be held to mean what it plainly says, because such clear statutory language is the best evidence of what the Congress intended. *Caminetti v. U.S.*, 242 U.S. 470 (1917); *Bank of State of Alabama v. Dalton*, 50 U.S. 249 (1849);

Amy v. Watertown, 130 U.S. 320 (1889); *U.S. v. Lombardo*, 241 U.S. 73 (1916).

Here, the statute clearly states that "notice of intent to file such action . . . shall be filed within one hundred and eighty days." Thus, the statute plainly requires that the notice must contain such words as to evidence a clear intention by a plaintiff to file a civil action against an identifiable defendant. Counsel for Mrs. Dartt stipulated that the oral complaint by Mrs. Dartt contained no mention of any intention to file any private civil action (A. 51, 52). An oral complaint to the Department of Labor which fails to contain any language which so indicates an intention to sue obviously cannot comply with the clear statutory language.

The statute further requires that the Notice of Intent to Sue be "filed." This Court has previously construed the word "file" as meaning the depositing of a written instrument with the government official whom Congress intended to receive such document. As this Court noted in *U.S. v. Lombardo, supra*, 241 U.S. at 76:

> The word "file" was not defined by Congress. No definition having been given, the etymology of the word must be considered and ordinary meaning applied. The word "file" is derived from the Latin word "filum," and relates to the ancient practice of placing papers on a thread of wire for safe keeping and ready reference. Filing, it must be observed, is not complete until the document is delivered and received. . . . A paper is filed when it is delivered to the proper official and by him received and filed.

The statute finally requires that this written document, evidencing an intent to sue, shall be filed with the Department of Labor within 180 days[4] after the alleged unlawful practice occurred. Here, Mrs. Dartt alleged that she was unlawfully discharged on July 31, 1973. Mrs. Dartt did not timely comply with the Section 626(d) requirement but filed her notice some thirty-six days too late. She argues that this slight delay is excusable.

However, as this Court noted in *Electrical Workers v. Robbins & Myers, Inc.*, ____ U.S. ____, 97 S. Ct. 411 (1976), with respect to a similar claim under Title VII:

> But the principle answer to this contention is that Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a "slight" delay . . . equally acceptable. In defining Title VII's jurisdictional prerequisites "with precision" [citation omitted], Congress did not leave to courts the decision as to which delays might or might not be slight. (97 S. Ct. at 448, 449)

Section 626(d) is plain and admits of no more than one meaning. It states that "No civil action may be commenced by any individual" unless a timely notice of intent to sue is filed. This Court must give its words the effect which Congress intended, and the time limits prescribed by Congress in that Section should be enforced according to

[4]The word "day" means, of course, calendar days. See, *Co. Litt.* 135; *Fox v. Abel*, 2 Conn. 541.

their expressed terms. Because Mrs. Dartt did not comply with the statutory requirements, her action was properly dismissed.

That the time period may be short is an argument not appropriately addressed to this Court. As this Court observed in another case where the plaintiff argued against the strict application of a limitations period:

> Such periods are established to cut off rights, justifiably or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary.
>
> Remedies for resulting inequities are to be provided by Congress, not the courts.[5]

B. The Legislative History Of Section 626(d) Supports A Strict Construction Of The Statute.

If the statutory language is clear and unequivocal, there is no need to refer to legislative history. Legislative history is significant only where there is ambiguity to be resolved, or where there is a need for interpretation because of an absurd or unreasonable effect by the literal words of the statute. *Ex Parte Collette*, 337 U.S. 55, at 61 (1949); *Gemsco, Inc. v. Walling*, 324 U.S. 244, at 260 (1945). Although it is unnecessary to refer to legislative history, because the statutory language of Section 626(d) is conclusive and equitable in its application, an examination of the legislative history supports the conclusion that

[5] *Kavanagh v. Noble*, 332 U.S. 535, at 539 (1947).

timely compliance with its requirements is a substantive jurisdictional prerequisite to suit.

Senate Bill 830 and its companion, H.R. 4221, were initially proposed by the Johnson Administration, as a result of a study on age discrimination which had been authorized at the time Title VII was enacted into law.[6] As proposed by the Administration, these bills provided for an enforcement mechanism similar to that under the National Labor Relations Act, whereby the aggrieved person filed a charge with the agency and relied upon it to protect his or her rights.[7]

There was widespread opposition on both sides of the Congress to the establishment of a new bureaucracy, with resultant delays in case handling.[8] As a result, bills were introduced in both the House and Senate to allow direct court enforcement of the Act by both aggrieved persons and the Department of Labor, under procedures similar to those under the Fair Labor Standards Act.[9]

When reported out by the respective committees of the House and Senate, the bills (S. 830 and H.R. 13054)[10]

[6] S. REP. NO. 723, 90th Cong., 1st Sess., p. 1-2 (1967); H.R. REP. NO. 805, 90th Cong., 1st Sess. p. 1-2 (1967); 42 U.S.C. § 2000e-14, P.L. 89-601, 80 Stat. 845.

[7] S. REP. NO. 723, at p. 5; H.R. REP. NO. 805, at p. 5.

[8] Remarks of Sen. Javits, 113 CONG. REC. 7076 (1967).

[9] 113 CONG. REC. 3337, 3466, 7076.

[10] H.R. 13054 apparently was substituted for H.R. 4221 while the bills were still in Committee.

followed the general enforcement scheme of the Fair Labor Standards Act.[11] Both the House and Senate bills provided that suits could be brought by either employees or the Department of Labor to enforce the statute. Both of the bills further provided that, as a "condition precedent" to suit by an employee, the employee must first give the Secretary of Labor a notice of his intent to sue and afford the Secretary a period of 60 days to conciliate the dispute.[12]

The one major difference in the House and Senate bills was that the Senate bill required that the Notice of Intent to Sue be "filed within one hundred and eighty days after the alleged unlawful practice occurred,"[13] whereas the House bill contained no such requirement.[14] Both the House and Senate bills passed in their respective bodies in the form reported out by their committees.[15]

Immediately after its passage of H.R. 13054, the House took up for consideration S. 830, which had been previously passed by the Senate. The House amended S. 830 by substituting the language of H.R. 13054 for that adopted

[11] Compare 113 CONG. REC. 31248-31249, and 113 CONG. REC. 34738-34740, with 29 U.S.C. § 216. *See also* S. REP. NO. 723, H. REP. NO. 805 on these bills.

[12] *See* 113 CONG. REC. 31250; 113 CONG. REC. 34748, Remarks of Rep. Dent.

[13] 113 CONG. REC. 31249. (See Appendix A, hereto)

[14] 113 CONG. REC. 34739. (See Appendix B, hereto)

[15] 113 CONG. REC. 34738-34753; 113 CONG. REC. 31248-31257.

by the Senate, thereby deleting the 180-day requirement. The House bill, H.R. 13054, was then laid on the table.[16]

The House sent S. 830, as amended, back to the Senate. The Senate refused to accept the deletion of the 180-day requirement from S. 830, and amended the House-passed version of S. 830 to restore this requirement.[17] In discussing the need for the provisions deleted by the House, Senator Javits (one of the leading sponsors of the bill) stated:

> Mr. President, the substance of the amendments . . . is that they are intended to answer some of the disquiet in American business.
>
> * * *
>
> This bill, which deals with age discrimination in employment, deals with some of the concerns of American business that the legislation would be open ended. These amendments are expressly designed to fix reasonable standards for regulations . . . keeping also in mind the practical problems of administration, and will answer some of the concerns expressed about it.[18]

After restoring the 180-day requirement, the Senate sent S. 830 back to the House. The House accepted the restoration of the 180-day requirement, and passed the bill on a voice vote.[19]

[16] 113 CONG. REC. 34753-34755.

[17] 113 CONG. REC. 35057. (See Appendix C, hereto)

[18] 113 CONG. REC. 35056.

[19] 113 CONG. REC. 35132.

It is apparent that American business vigorously supported the 180-day requirement, viewing the House bill as "open ended."[20] The fact that the 180-day requirement was deleted by the House, restored by the Senate, and then accepted by the House reveals that Congress attached significant importance to the 180-day requirement. Indeed, Congress enacted only one limited exception to the 180-day requirement, allowing such period to be extended for a maximum of an additional 120 days where an individual first sought relief from a state agency which enforced a similar law against age discrimination.[21]

As finally enacted, the bill was a compromise between the initial administration bill (with no right to a private suit) and the House bill (which allowed private suits at any time within the two-year statute of limitations period upon 60 days notice to the Secretary). The final statute reveals a clear Congressional intention that the majority of age discrimination complaints would be handled by the Department of Labor. A very limited right to bring a private action was preserved only for those plaintiffs who moved quickly to bring their own lawsuits. Persons who did not act quickly to file a notice of intent to bring a private suit were left to the administrative actions of the

[20] 113 CONG. REC. 35056.

[21] See 29 U.S.C. § 626(d)(2). Oklahoma does not have any state statute prohibiting age discrimination by private employers, and the extended filing period did not apply to this case.

Department of Labor, which is under no similar 180-day requirement.

There were legitimate reasons for Congress to have so circumscribed a private right of action. It is a recognized fact in business circles that litigation, even if frivolous, is very expensive. An employer against whom an individual suit is brought under the A.D.E.A. runs the risk of incurring not only the expenses of backpay, liquidated damages, and its own litigation expenses, but also the litigation expenses of the plaintiff.[22]

When faced with definite notice of a threatened lawsuit while the total amount of backpay is still relatively small, the employer has a significant impetus to settle the case.[23] Not only will the employer be able to spend only small sums for backpay and its own attorney fees, but also the task of reinstating the complainant is made easier, as no replacement may yet have been hired,[24] and reinstatement may be less embarrassing to (and therefore less opposed by) the supervisors involved. However, as the backpay amounts grow larger through the passage of time, and

[22] 29 U.S.C. § 626(b); 29 U.S.C. § 216(b).

[23] See the analogous Title VII case of *EEOC v. Hickey-Mitchell Co.*, 507 F.2d 944 (8th Cir. 1974), wherein the Eighth Circuit found that even the most recalcitrant employer is more likely to settle when told it will be sued. The Eighth Circuit found substantial prejudice to the employer by the failure of EEOC to timely notify it that suit was to be filed.

[24] Or, if hired, will not yet have become a familiar face in the workforce.

replacements are hired and become settled in, the employer has increasingly less impetus to settle the case. Thus, Congress had legitimate reasons for requiring prompt notice of possible private litigation, in order to promote effective settlement of such claims.

Moreover, employers obviously considered it preferable to have the Department of Labor administratively "weed out" unfounded complaints in the administrative process, as they strongly supported the short limitation period on private suits. Nowhere in the legislative history does it appear that organizations of older workers voiced opposition to this restriction of the right to a private lawsuit.[25] Congress balanced the interests of employers in being free from frivolous and expensive private litigation with the interests of some complainants in being able to privately pursue their own claims, by enacting strict limitations on the ability to bring a private suit.

As a result, the legislative history clearly supports the conclusion that Congress intended to specifically limit private suits, and to allow such suits only where the plaintiff timely complied with the requirements of Section 626 (d). Congress indicated the mandatory nature of this requirement in the opening sentence of Section 626(d), when

[25] Indeed, such organizations may have considered it preferable (for all but their most litigious members) to forego a private suit and utilize an inexpensive administrative agency to enforce their statutory rights.

it stated "No civil action may be commenced by any individual" unless a timely notice of intent to sue is filed and when it referred to this requirement as a "condition precedent" to the maintenance of a private civil action.

It is further clear, from both the statutory language and the legislative history, that a mere oral complaint of age discrimination to the Department of Labor does not satisfy the Notice of Intent to Sue requirements. Under the enforcement scheme enacted by Congress, oral complaints of age discrimination may be registered at any time within the statute of limitations period.[26] Such complaints trigger the separate investigative and administrative procedures of the Department of Labor, and are wholly unnecessary for the maintenance of a private suit. Thus, such complaints neither put the Department of Labor nor the employer on notice that a private suit is being contemplated.

An amendment was offered by Senator Javits to S. 830 which would have preserved a right of private suit simply by the registering of a complaint of age discrimination against a respondent.[27] However, that amendment never survived the Senate Committee, and was never again offered when the Senate as a whole considered S. 830. As a result, it is apparent that Congress intended that a

[26] 29 U.S.C. § 626(e) incorporates the limitations periods of the F.L.S.A., found in 29 U.S.C. § 255, which establishes a two-year limitation period (three years, if willful).

[27] 113 CONG. REC. 7077. (See Appendix D, hereto)

notice "of intent to sue" be precisely that, and not simply a charge alleging age discrimination.

Moreover, to allow indefinite tolling of the Notice requirement where an oral complaint is registered with the Department of Labor would be the equivalent of allowing a Notice of Intent to Sue to be filed at any time within the two-year statute of limitations. This approach was initially sought in the House bill, but was expressly rejected by Congress. It must likewise be rejected by this Court.

The legislative history makes it plain that timely compliance with Section 626(d) is not only mandatory, but also that the 180-day filing period may not be indefinitely extended by a mere oral complaint of age discrimination. The Court of Appeals erroneously interpreted the statute, and its decision must be reversed.

C. The Weight Of Authority Establishes That The 180-Day Limitation Period Is Jurisdictional And Should Not Be Suspended By The Equitable Doctrine Of Tolling.

At issue in the case at bar is not just a general statute of limitations, but, rather, a comprehensive statute which creates a new cause of action and which establishes a specific time limitation for the assertion of that newly-created right. It is well settled that time restrictions contained in the same statute which create the cause of

action constitute a limitation on the right itself, and are subject to a more strict construction than ordinary statutes of limitations.[28] The jurisdiction of the federal courts to hear private actions under the A.D.E.A. is derived from the statute itself, and the 180-day period for filing a notice of intent to sue is a jurisdictional prerequisite to suit.

Unlike a statute of limitations, which is subject to waiver and other equitable considerations, a jurisdictional defect cannot be waived nor can it be cured even with consent of the parties.[29] If the jurisdictional prerequisite is not met, an essential condition of liability must be found lacking and the court is deprived of subject matter jurisdiction. As was noted previously, Congress clearly indicated that timely compliance with Section 626(d) was jurisdictional when it stated that "No civil action may be commenced" unless the requirements of the section were met.

Every other circuit ruling on the issue has found that Congress intended that timely compliance with Section 626(d) be a jurisdictional prerequisite to the maintenance of a private action under the A.D.E.A., not

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[28] *U.S. ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157 (1914); *Kavanagh v. Noble*, 332 U.S. 539 (1947); *Electrical Workers v. Robbins & Myers, Inc.*, ___ U.S. ___, 97 S. Ct. 441 (1976). *See also, Developments In The Law, Statutes of Limitations*, 63 HARV. L. REV. 1177, at 1186-1190 (1950).

[29] Cf. *Hinton v. CPC International, Inc.*, 520 F.2d 1312 (8th Cir. 1975).

subject to equitable tolling principles. Thus, in *Ott v. Midland-Ross Corp.*, 523 F.2d 1367 (6th Cir. 1975), the Sixth Circuit expressly rejected the argument that the Section 626(d) limitations period was analogous to the F.E.L.A. statute of limitations problem presented in *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959). The Sixth Circuit pointed out that A.D.E.A. suits are governed by a separate statute of limitations set forth in 29 U.S.C. § 255, and held that, while Section 255 was governed by the *Glus* tolling principle, Section 626(d)(1) was not. The Fifth Circuit reached the identical conclusion in *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir. 1974), holding that timely compliance with Section 626(d) "is simply a prerequisite to the right to file any suit whatsoever under the ADEA" (494 F.2d at 487).

In *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975), the Eighth Circuit stated that timely compliance with Section 626(d) is a jurisdictional requirement, and indicated that it would treat untimely compliance in the same manner as it did in the Title VII case of *Hinton v. CPC International, Inc.*, 520 F.2d 1312 (8th Cir. 1975). In the *Hinton* case, the plaintiff failed to file suit within 90 days after receipt of his Right-to-Sue letter from the E.E.O.C., in reliance upon the agreement of the defendant not to raise the issue of timeliness while the parties engaged in pre-suit settlement negotiations. Suit was later filed, and the district court dismissed the action *sua sponte*

for lack of jurisdiction. In spite of clear equities in the plaintiff's favor, the Eighth Circuit affirmed, holding that it could not modify a jurisdictional prerequisite upon equitable grounds.

The Fifth and Sixth Circuits have reached similar conclusions in other cases where there were equities in the favor of the plaintiff which arguably might have tolled a statute of limitations. In *Hays v. Republic Steel Corp.*, 531 F.2d 1307, at 1312 (5th Cir. 1976), the plaintiff told the Department of Labor that he intended "to do something about it," when reminded that a Notice of Intent to Sue was required and the 180 day period had almost expired. He actually prepared a written notice, but became suddenly ill and did not file his notice within the statutory period. The Fifth Circuit affirmed the dismissal of his suit, finding that his oral complaint to the Department of Labor did not equate with the filing of the Section 626(d) notice. The Court refused to modify the 180 day period, stating "This court cannot waive a limitation period established by Congress." (531 F.2d at 1312).

Similarly, in *Edwards v. Kaiser Aluminum & Chemical Sales Corp.*, 515 F.2d 1195 (5th Cir. 1975), the Fifth Circuit rejected a claim by the plaintiff that the defendant had committed a constructive fraud by failing to post the required A.D.E.A. posters, and that the Section 626(d) requirement should be tolled due to this fraud. The Court refused to modify the 180-day limitation period, reiterating

its view that timely compliance with Section 626(d) "is simply a prerequisite to the right to file any suit whatsoever under the ADEA." (515 F.2d at 1199).

In *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1975), the plaintiff argued that the employer had wrongfully concealed his cause of action, and that the time for filing the Section 626(d) notice was thereby tolled. The Court expressed grave doubt that any tolling of the 180-day period would be permissible, because the statute created an "imperative requirement" which was expressed in "unequivocal statutory language." (521 F.2d at 634).

Finally, in *Eklund v. Lubrizol Corp.*, 529 F.2d 247 (6th Cir. 1976), the Sixth Circuit held that the "imperative nature" of the Section 626(d) notice requirement precluded any equitable tolling of the 180-day limitations period. There, the plaintiff erroneously believed that there was an adequate state remedy available, and he attempted to pursue it. His notice of intent to sue was filed 299 days after his discharge, and would have been timely if the state remedy had been adequate. However, the Sixth Circuit found that the state law was insufficient to allow the plaintiff to invoke the 300-day notice period allowable under 29 U.S.C. § 626(d)(2). Although there were clear equities in the plaintiff's favor, the Court affirmed the dismissal of his action, finding that it could not grant equitable modifications of the 180-day limitation period.

The above cases reveal that the Tenth Circuit is alone

among the circuits in its conclusion that the Section 626(d) limitation period is subject to equitable modifications. This Court should follow the great weight of Circuit Court and District Court authority,[30] and hold that the time period set forth in Section 626(d) must be considered a substantive jurisdictional prerequisite to suit, which is not subject to equitable modifications.

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[30] *Powell v. Southwestern Bell Tel. Co.*, 494 F.2d 485 (5th Cir. 1974); *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195 (5th Cir. 1975); *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1976); *Ott v. Midland-Ross Corp.*, 523 F.2d 1367 (6th Cir. 1975); *Eklund v. Lubrizol Corp.*, 529 F.2d 247 (6th Cir. 1975); *Woodburn v. LTV Aerospace, Inc.*, 531 F.2d 750, (5th Cir. 1976); *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1976); *Hays v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976); *Oshiro v. Pan American World Airways, Inc.*, 387 F. Supp. 80 (D.C. Haw. 1974); *Vaughn v. Chrysler Corp.*, 382 F. Supp. 143 (E.D. Mich. 1974); *Blankenship v. Ralston Purina Co.*, 62 F.R.D. 35 (N.D. Ga. 1973); *Burgett v. Cudahy Co.*, 361 F. Supp. 617 (D.C. Kan. 1973); *Gebhard v. GAF Corp.*, 59 F.R.D. 504 (D.C. D.C. 1973); *Price v. Maryland Casualty Co.*, 62 F.R.D. 614 (D.C. S.D. 1974); *Cochran v. Ortho Pharmaceutical Co.*, 376 F. Supp. 302 (E.D. La. 1971); *Acford v. Exxon Corp.*, ___ F. Supp. ___, 12 FEP Cases 1500 (D.C. Conn. 1975); *Hughes v. Beaunit Corp.*, ___ F. Supp. ___, 12 FEP Cases 1564 (E.D. Tenn. 1976); *Brohl v. Singer Co.*, 407 F. Supp. 936, (M.D. Fla. 1976); *Raynor v. Great Atlantic & Pacific Tea Co.*, 400 F. Supp. 357 (E.D. Va. 1975); *Mizugachi v. Molokai Electric Co.*, 411 F. Supp. 590, (D.C. Haw. 1976); *Berry v. Crocker National Bank*, ___ F. Supp. ___, 13 FEP Cases 673 (N.D. Cal. 1976); *Hayes v. Southern Pacific Co.*, ___ F. Supp. ___, 13 FEP Cases 753 (C.D. Cal. 1976); *Goodman v. Heublein, Inc.*, ___ F. Supp. ___, 13 FEP Cases 26 (D.C. Conn. 1976); *Grossfield v. W.B. Saunders Co.*, ___ F. Supp. ___, 1 FEP Cases 624 (S.D. N.Y. 1968); *Balc v Steelworkers, Local 13263*, ___ F. Supp. ___, 6 FEP Cases 824 (W.D. Pa. 1973); *McCrickard v. Acme Visible Records, Inc.*, 409 F. Supp. 341, (W.D. Va. 1976).

II.

THERE IS NO COMPELLING REASON TO ENGRAFT EXCEPTIONS ONTO SECTION 626(d).

The Court of Appeals held that the 180-day requirement was analogous to a statute of limitations, and should be liberally interpreted so as to permit tolling on equitable grounds (A. 32). In the view of the Court of Appeals, because the A.D.E.A. is remedial and humanitarian legislation, "strict compliance with section 626(d)(1)'s time limitation should not be required of laymen attempting to enforce their statutory rights." (A. 32).

Shell submits that both the statutory language and the legislative history establish that Congress intended timely compliance with Section 626(d) to be a substantive jurisdictional prerequisite to suit, which would be tolled (if at all) only under most egregious circumstances not present here. However, even if the 180-day requirement is analogous to a statute of limitations, it is well-settled that "[t]he basic question to be answered in determining whether, under a given set of facts, a statute of limitations is to be tolled, is one 'of legislative intent.'" *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, at 426 (1965).

As will be discussed below, the District Court correctly found that Mrs. Dartt failed to establish facts which would even warrant the tolling of an ordinary statute of limitations (A. 23). The District Court further correctly

found that Congress could not have intended that the 180-day limitation period of Section 626(d)(1) be tolled "for any less compelling reason than would justify the tolling of a statute of limitations." (A. 23). Shell urges that substantial legal precedent requires this Court to reach the same conclusion.

A. Fundamental Principles Of Equity Bar Tolling Where A Plaintiff Misses Time Limitations Through Simple Ignorance Of The Law.

Shell urges that the jurisdictional nature of Section 626(d) requires that no equitable tolling of the requirement is permissible. However, even assuming *arguendo* that the 180-day notice requirement is analogous to a statute of limitations, Shell submits that the District Court properly found that such period should not be tolled "for any less compelling reason than would justify the tolling of a statute of limitations." (A. 23).

Here, no facts exist which would warrant the tolling of a statute of limitations in a comparable situation. The courts have been exceedingly guarded in implying exceptions to statutes of limitations,[31] and recognize only a limited class of exceptions arising from circumstances where a plaintiff has been prevented, through no fault of his own, from timely asserting his rights.[32] These excep-

[31] *M'Iver v. Ragan*, 2 Wheat. 25, 4 L. Ed. 175 (1817).

[32] *Developments In The Law, Statutes of Limitations*, 63 HARV. L. REV. 1177, at 1220 (1950); 1 J. STORY EQUITY JURISPRUDENCE 136 (11th Ed. 1873).

tions fall into the three following categories: (1) conduct of the defendant prevented the plaintiff from acting; (2) the plaintiff was operating under some legal disability; or, (3) the plaintiff was prohibited by law from filing suit.

There is no evidence that Shell was in any way responsible for the failure of Mrs. Dartt to timely file her notice of intent to sue. Shell neither attempted to mislead Mrs. Dartt as to the time for filing her notice,[33] nor did it attempt to wrongfully conceal the existence of her cause of action.[34] Shell was not under any duty to inform Mrs. Dartt of the requirements of Section 626(d), and did all that it was legally required to do when it posted the A.D.E.A. posters[35] and cooperated in the investigation by the Department of Labor.[36] Likewise, there is no evidence that the Department of Labor wrongfully misled Mrs. Dartt

[33] Cf. *Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231 (1959).

[34] Cf. *Reeb v. Equal Opportunity Atlanta,* 516 F.2d 924 (5th Cir. 1974).

[35] Cf. *Bishop v. Jelleff Associates, Inc.,* 398 F. Supp. 579 (D.D.C. 1974). Even if these posters are found to be deficient, Shell is expressly insulated from liability therefor by 29 U.S.C. § 259.

[36] The suggestion by the Tenth Circuit that Shell was deliberately stalling in furnishing the requested data finds no support in the record. Mr. Speer never testified that he thought the delay was unreasonable. In fact, there is no evidence that he even contacted Shell between the time he requested the data in November of 1973 and the time Shell telephoned him on February 25, 1974, to report on its progress (A. 82). Clearly, Mr. Speer would have pressed harder for the data, or even subpoenaed it, if the delay were unjustified.

as to what she needed to do to preserve her private right of action. At most, the failure of the Department to do so was a simple oversight by a busy government official, which Mrs. Dartt could have easily remedied herself if she had made a reasonable inquiry as to what was necessary to preserve her rights. Moreover, even if the Department wrongfully failed to inform Mrs. Dartt of the Section 626(d) requirements, Shell cannot be held liable for the omissions of the Department. Actions of a third party, not in privity with a defendant, have traditionally been held to be insufficient to warrant a tolling of a statute of limitations.[37]

It was never alleged that Mrs. Dartt was under any legal disability which prevented her from filing suit, nor, as will be subsequently discussed, was she otherwise prevented from doing so by matters beyond her control. Thus, this is a classic case for the application of the well-settled law on the effect of ignorance upon a statute of limitations. It has been said:

[37] See, e.g., *Cato v. South Atlantic & Gulf Coast Dist. of Intl. Longshmn. Assn.,* 364 F. Supp. 489, at 493 (S.D. Tex. 1973), affd. per curiam 485 F. 2d 583 (5th Cir. 1973). See also, *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.,* 515 F.2d 1195 (5th Cir. 1975), wherein the Fifth Circuit expressly declined to charge the employer with the derelictions of third parties — the plaintiff's attorneys. Indeed, Congress appears to have foreclosed any reliance by Mrs. Dartt on the omission of the Department of Labor by its incorporation of 29 U.S.C. § 259 into the A.D.E.A. See, e.g., *Hodgson v. Square D Co.,* 459 F.2d 805 (6th Cir. 1972). By expressing what agency actions could be relied upon, Congress excluded actions such as those taken by the agency here.

> It is a well-known maxim, that ignorance of the law will not furnish an excuse for any person, either for a breach, or for an omission of duty; *Ignorantia legis neminem excusat;* and this maxim is equally as much respected in equity as in law. It probably belongs to some of the earliest rudiments of English jurisprudence; and is certainly so old, as to have been long laid up among its settled principles.[38]

Nor does it make any difference that Mrs. Dartt may have been mistaken as to the remedies available to her. As this Court stated in *Willard v. Wood,* 164 U.S. 502 at 523 (1896):

> The general rule in respect of limitations must also be borne in mind, that if a plaintiff mistakes his remedy, in the absence of any statutory provision saving his rights, or where from any cause a plaintiff becomes non-suit or the action abates or is dismissed, and, during the pendency of the action, the limitation runs, the remedy is barred.

Likewise, it is of no importance that Mrs. Dartt may have been ignorant of her rights due to her lack of education or mental acuity. As one commentator stated:

> The court cannot undertake to estimate the chance, which the state of mind and education of a man may afford of his making such a discovery, and it is therefore compelled to assume that every one, not actually a lunatic, is competent to judge of and to obtain

[38] 1 J. STORY, EQUITY JURISPRUDENCE 108, 109 (11th Ed. 1873). *See also, North Laramie Land Co. v. Hoffman,* 268 U.S. 276, at 283 (1925).

> advice concerning his rights, and to assert them if necessary.[39]

Here, Mrs. Dartt was put on notice of the existence of the A.D.E.A. by the posters displayed by Shell throughout its facilities. She already had presumptive knowledge of the existence of that statute and its provisions. She then consulted an attorney, who told her that she did not need an attorney "at that time" (A. 48). Thereafter, Mrs. Dartt went to the Department of Labor, and admitted that she never asked any questions whatsoever as to what her rights were or what procedures she needed to follow to preserve her rights.

Mrs. Dartt must be found to have had sufficient notice of the statute, and of the provisions of Section 626(d). As this Court held in *Wood v. Carpenter,* 101 U.S. 135, at 141 (1879):

> 'Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it.' *Kennedy v. Greene,* 3 Myl. & K. 722.

It is clear that Mrs. Dartt's attention was "excited" to possible violations of her rights under the A.D.E.A. It is further clear that, in her own mind, Mrs. Dartt believed that the facts were sufficient to cause her to start an inquiry as to her rights under the A.D.E.A. It is finally clear that,

[39] 1 J. STORY, EQUITY JURISPRUDENCE 856 (11th Ed. 1873).

had she continued her inquiry, she would have discovered the existence of Section 626(d). Because a reasonable inquiry would have led her to discover her rights, this Court should not excuse her failure to make such an inquiry.[40]

Shell submits that this Court should eschew any inquiry into the facts of each case, to determine whether a particular plaintiff either had actual knowledge of Section 626(d) or would have obtained such knowledge upon a reasonable inquiry. To adopt such a rule would enmesh the district courts in a hopeless quagmire and unduly prolong A.D.E.A. litigation. Indeed, this case presents a good example of the differing standards which would result from the application of such a rule, as the District Court and the Court of Appeals reached diametrically opposed conclusions as to the reasonableness of the inquiry by Mrs. Dartt and the relative equities in her favor. Moreover, it is significant that this Court deemed it unnecessary to make any inquiry into the knowledge by a Title VII plaintiff of the 180-day charging requirement, in holding that such requirement must be strictly applied. *Electrical Workers v. Robbins & Myers, Inc.*, ___ U.S. ___, 97 S. Ct. 441 (1976). Notably, the Title VII poster, like the A.D.E.A. poster, fails to mention time limitations (Pet. App. 41a, 45a). There is no legitimate reason to

[40] *Wood v. Carpenter, supra; Stearns v. Page,* 7 How. 819, 48 U.S. 418 (1848); *Hardt v. Heidweyer,* 152 U.S. 547 (1894); *Gordon v. Kimmell,* 99 U.S. 201 (1878).

excuse A.D.E.A. plaintiffs from presumptive knowledge of the provisions of the Act, when plaintiffs under equally remedial statutes are charged with presumptive knowledge of the provisions of such statutes.

In any event, even assuming *arguendo* that this Court were to permit tolling of the 180-day notice period under certain circumstances, the indefinite tolling permitted by the Court of Appeals is clearly impermissible. Even under the most egregious circumstances, such as fraud, this Court has consistently held that the statute of limitations is not tolled indefinitely. Rather, the statute begins to run again when the plaintiff actually learns, or reasonably should have learned, of the fraud.[41]

Therefore, assuming *arguendo* that the 180-day notice period may be tolled due to ignorance of the requirement, this Court must follow established legal precedent and rule that the notice period begins to run again when the plaintiff acquires the means of knowledge of the Section 626(d) requirement. Here, Mrs. Dartt acquired the means of knowledge of the requirement when she consulted her first attorney and the Department of Labor on or before August 9, 1973. As a result, the 180-day limitations period began to run again at that point, and expired some 27 days before her notice was filed. Therefore, the District Court

[41] *Hardt v. Heidweyer,* 152 U.S. 547 (1894); *Stearns v. Page,* 7 How. 819, 48 U.S. 418 (1848); *Wood v. Carpenter,* 101 U.S. 135 (1879). *See also, Developments In The Law, Statutes of Limitations,* 63 HARV. L. REV. 1177, at 1220 (1950).

properly dismissed her action, and its decision should be affirmed.

B. Legal Precedent Establishes That A Limitations Period Is Not Tolled Through The Use Of Separate, Alternative Remedies.

The District Court found that, under the A.D.E.A., there are two separate and distinct enforcement mechanisms. Under the first enforcement mechanism, a complainant may go to the Department of Labor at any time within the applicable statute of limitations and register a complaint of age discrimination. The complainant places full reliance on the Department of Labor to protect his or her rights, and is bound by any settlement reached by the Department.

Under the second enforcement mechanism, the complainant invokes an entirely different procedure. All that this person must do to be able to bring a private action is to file a Notice of Intent to Sue within 180 days after the alleged violation, and then afford the Department a period of sixty days in which to mediate the dispute. This complainant need never invoke the first enforcement mechanism and, unlike one who invokes the first enforcement mechanism, is free to reject any proposed settlement by the Department of his case.

The District Court found that a complainant who wishes to bring a private A.D.E.A. action is not required to invoke the first enforcement mechanism, and one who

does so is seeking a permissive administrative remedy (A. 19, 20). The District Court therefore followed a long line of cases holding that pursuit of a permissive remedy does not toll a limitations period,[42] and refused to toll the Section 626(d) notice period based upon the resort by Mrs. Dartt to the first enforcement mechanism.

The reasoning of the District Court is persuasive, and should be followed by this Court. This case is closely analogous to the situations recently presented to this Court in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) and in *Electrical Workers v. Robbins & Myers, Inc.*, ___ U.S. ___, 97 S. Ct. 441 (1976). The plaintiff in *Johnson* had two separate and distinct remedies for racial discrimination, one under Title VII and one under 42 U.S.C. § 1981. The plaintiff in *Robbins* likewise had two separate and distinct remedies for racial discrimination, one under Title VII and one under the grievance-arbitration machinery of a collective bargaining agreement.

The plaintiffs in both *Johnson* and *Robbins* argued vigorously that their pursuit of one remedy should toll the time limitations for pursuit of the alternative remedy. In *Johnson*, this Court held that the fundamental answer to the issue of tolling was whether the plaintiff had "an unfettered right" to pursue either remedy (95 S. Ct. at

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[42] *Steel Improvement & Forge Co. v. U.S.*, 355 F.2d 627 (Ct. Cl. 1966); *O'Callahan v. U.S.*, 451 F.2d 1390 (Ct. Cl. 1971). *See also, Comacho v. U.S.*, 494 F.2d 1363, at 1369 (Ct. Cl. 1974); *Soriano v. U.S.*, 352 U.S. 270 (1957).

1723). In *Robbins*, this Court reiterated its views expressed in *Johnson* that no tolling was permissible where the plaintiff was not "prevented from asserting" her alternative claim (97 S. Ct. at 447, n. 10).

Here, Mrs. Dartt had an unfettered right to pursue either her administrative or judicial remedies. Her oral complaint was neither required as a condition precedent to filing a Notice of Intent to Sue, nor did such complaint bar Mrs. Dartt from timely compliance with Section 626(d). Mrs. Dartt made a conscious decision not to hire an attorney and inquire into her rights, stating:

> I thought the Department of Labor would take care of everything and I frankly thought an attorney would be an added expense and if the Department of Labor would handle it, why bother with an attorney (A. 44).

Thus, Mrs. Dartt is in the precise situation as the plaintiff in *Johnson*, who placed his faith in EEOC resolution of his charge, and slept on his independent judicial remedy under 42 U.S.C. § 1981. This Court should reach the same conclusion which it reached in *Johnson*, that: "The fact that his slumber may have been induced by faith in his Title VII remedy is of little relevance, inasmuch as the two remedies are truly independent." (95 S. Ct. at 1723).

Indeed, one of the principle policy arguments present in *Johnson* is not present in the instant case. In *Johnson*, the plaintiff argued that pursuit of his § 1981 remedy

would force him into premature litigation, and frustrate the national policy in favor of conciliation of racial discrimination complaints. Here, there is no similar negative result by the pursuit of both the administrative and judicial remedies available to a private plaintiff under the A.D.E.A. Once having filed a Notice of Intent to Sue to preserve his judicial remedy, an A.D.E.A. plaintiff may continue to pursue his administrative remedies and select the time when suit will be filed (subject to the statute of limitations contained in 29 U.S.C. § 255).[43]

Congress could have, as Senator Javits proposed,[44] allowed the preservation of both the administrative and judicial remedies of a complainant by the simple filing of a charge. It did not do so. Instead, Congress only allowed a limited extension of time for the preservation of the judicial remedy in cases where a complainant filed a charge with a state agency. Congress, of course, could have made this same extension of time applicable to situations where charges were registered with the Department of Labor. Because it did not, this Court ought not engraft an extension of time onto Section 626(d)(1).[45]

To hold otherwise would fly in the face of the well-

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[43] It is noteworthy that, under the F.L.S.A., the making of a complaint to the Labor Department does not toll the statute of limitations period, set forth in 29 U.S.C. § 255, for the filing of a private suit. *Shandelman v. Schuman*, 92 F. Supp. 334 (E.D. Pa. 1950).

[44] 113 CONG. REC. 7077.

[45] Cf. *Electrical Workers v. Robbins & Myers, Inc.*, ___ U.S. ___, 97 S. Ct. 441, at 449 (1976).

settled principle that pursuit of permissive remedies does not warrant any tolling and would, in a very real sense, require this Court "to read the notice section out of the statute."[46]

C. The Weight Of Authority Establishes That A Limitations Period May Not Be Tolled Where Alternative Actions By A Plaintiff Fail To Convey Proper Statutory Notice Of Suit.

Mrs. Dartt argues that her oral complaint to the Department of Labor, within nine days after her discharge, put Shell on notice that she was pursuing her A.D.E.A. rights, and such oral complaint was sufficient to toll the 180-day limitations period for filing a written notice of intent to sue. She argues that the purposes of Section 626 (d) were satisfied by her oral complaint, and that this case is, therefore, controlled by the decision of this Court in *Burnett v. New York Central R.R. Co.*, 380 U.S. 424 (1965).

Shell submits that the reliance by Mrs. Dartt upon *Burnett* is misplaced, for two reasons. First, *Burnett* dealt with an ordinary statute of limitations, rather than with a jurisdictional prerequisite. As was previously discussed, tolling principles applicable to statutes of limitations do not apply to jurisdictional prerequisites.

Secondly, even if *Burnett* did apply to the Section 626(d) limitation period, that case is more helpful to Shell than to Mrs. Dartt. In *Burnett*, the defendant was timely

[46] *Powell v. Southwestern Bell Telephone Co., supra,* 494 F.2d at 490.

and properly given notice of the lawsuit by plaintiff through service of process made in accordance with the statute. There was no defect in the notice given; rather, the only defect was in venue. Because the defendant in *Burnett* had received timely and proper notice of the lawsuit by the plaintiff, this Court found that tolling should be allowed.

Here, it is undisputed that Shell never received any timely notice that Mrs. Dartt intended to file a civil action against it. Thus, Shell is in an analogous position to the employers in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), and *Electrical Workers v. Robbins & Myers, Inc.*, ___ U.S. ___, 97 S. Ct. 441 (1976). In those cases, this Court held that *Burnett* was inapplicable to situations where the employer did not receive notice, in the manner contemplated by the statute, that the plaintiff intended to bring suit against it under a particular statute.

A close reading of *Burnett*, *Johnson* and *Robbins & Myers* yields the conclusion that the central question in deciding whether any tolling is permissible is whether the defendant received the notice which Congress intended it to receive as to the claim.[47]

[47] Closely related, but logically separate, is the line of cases previously discussed, which refuses to allow any tolling while a plaintiff pursues permissive administrative remedies. Those cases hold that, if there is no legal impediment to assertion of a cause of action in a particular forum, a plaintiff has no claim on equity if he fails to pursue it.

Shell submits that the clear language of Section 626(d) requires that a defendant receive actual notice that a plaintiff intends to file a civil action against it. As was noted previously, Congress believed that early notice of an impending private lawsuit was essential to the enforcement scheme of the A.D.E.A. Such notice gives an employer added incentive to engage in conciliation, because failure of conciliation will result in expensive litigation. The short sixty-day conciliation period further adds a sense of urgency to settlement discussions, and the Department of Labor is required to actively pursue all settlement possibilities.

An oral complaint to the Department of Labor does not give an employer any notice that the complainant intends to sue it. At most, it notifies the employer that, if the Department of Labor finds merit to the complaint and if the Department of Labor believes that the evidence is sufficient to institute suit, the Department of Labor may decide to file suit. There is no companion sense of urgency to resolve oral complaints at their early stages, because the employer does not face an immediate lawsuit.

Thus, in a very real sense, the employer is prejudiced when it is deprived of the early knowledge that a private suit is to be brought against it, because it is deprived of the early opportunity to make an informed business decision as to whether settlement is advisable. As a result, where the employer is deprived of the thrust of the strong

negative impetus of an impending lawsuit while other factors favoring speedy settlement are at their optimum,[48] the Congressional purpose of promoting settlement of private suits is thwarted.

The Court of Appeals erred in finding that the oral complaint by Mrs. Dartt fulfilled the *de facto* purposes of Section 626(d). Such a complaint neither gives the employer any notice that it will be sued, nor does it fulfill the statutory purposes behind such requirement.[49] The other circuits ruling on this issue, as well as several district courts, have repeatedly found that a mere oral complaint to the Department of Labor is insufficient to satisfy the requirement, or to toll the time for meeting the requirement. Thus, in *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir. 1974), the plaintiff registered an oral complaint to the Department of Labor within the 180 day period, but failed to file a notice of intent to sue until after the 180 days had expired. The plaintiff argued that her oral complaint, together with the informal action on her behalf by the agency, was sufficient to satisfy or, at least, toll the notice period. The Fifth Circuit disagreed,

[48] i.e., small backpay, no need to discharge replacements, etc.

[49] The Court of Appeals appears to have tacitly admitted that Dartt's oral complaint did not convey the required notice when it stated, "To hold that a complaint to the Labor Department of an alleged discriminatory employment practice complies with this requirement, even though the complaint never mentions an intent to file a private civil action under the ADEA, would be in complete disregard of the language of the Act." (A. 29).

and dismissed her action, stating: "To consider informal action by the Secretary in her behalf as tolling the 180 day requirement would be to read the notice section out of the statute, an action we are not prepared to take." (494 F.2d at 490).

Similarly, in *Hays v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976), the Fifth Circuit reiterated its view that an oral complaint to the Department of Labor "is not the same as filing a notice of intent to bring a civil court action." (531 F.2d at 1312).[50] Likewise, in *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1976), the Sixth Circuit held that an oral complaint to the Labor Department "does not constitute notice of intent to sue as mandated by the statute," citing with approval the decision by the District Court in the instant case (521 F.2d at 634).[51]

In addition to the clear statutory language and the virtual unanimity of the decisions of the courts, indicating that a mere oral complaint cannot satisfy Section 626(d),

[50] *See also Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195 (5th Cir. 1975), wherein direct notice by a private attorney to the employer of possible suit did not satisfy or toll the notice requirement, because such notice was not also timely furnished to the Department of Labor.

[51] *See also, Berry v. Crocker National Bank*, ___ F. Supp. ___, 13 FEP Cases 673 (N.D. Cal. 1976); *Goodman v. Heublein, Inc.*, ___ F. Supp. ___, 13 FEP Cases 26 (D. Conn. 1976); *Hughes v. Beaunit Corp.*, ___ F. Supp. ___, 12 FEP Cases 1564 (E.D. Tenn. 1976); *Grossfield v. W. B. Saunders Co.*, ___ F. Supp. ___, 1 FEP Cases 624 (S.D. N.Y. 1968); *Acford v. Exxon Corp.*, ___ F. Supp. ___, 12 FEP Cases 1500 (D. Conn. 1975).

there are two other factors which support the contention by Shell that the *de facto* purposes of Section 626(d) were not met by Mrs. Dartt's oral complaint. The first is the interpretation by the Department of Labor as to what type of notice satisfies Section 626(d), and the second is the actions taken by the Department in the instant case.

In an administrative opinion letter issued by Assistant Secretary of Labor Donahue on August 26, 1968, setting forth the requirements for compliance with Section 626(d), the Department stated:

> No particular form is necessary in order to notify the Secretary of Labor of an intent to file suit under the Age Discrimination in Employment Act. However, such notice should be provided in writing and properly addressed to the Department of Labor.[52]

Thus, it is apparent that the Department of Labor requires that it receive a written notice evidencing an intent to sue before it sets in motion its conciliation functions and its analysis of the case as one for intervention or preemptive suit.[53] In the instant case, the Department of Labor obviously did not consider the oral complaint by Mrs. Dartt as satisfying the requirements of Section 626(d), stating to her in a letter:

> The fact that you submitted information concerning an alleged unlawful practice has not been considered

[52] FEP Manual 401:5213.

[53] This administrative interpretation is entitled to "great deference." Cf. *Griggs v. Duke Power Co.*, 401 U.S. 424, at 435 (1971).

a notice to the Secretary of Labor of intent to file suit (A. 69).

In addition, the actions by the Department of Labor in the instant case belie any conclusion that the administrative processing of Mrs. Dartt's oral complaint satisfied the *de facto* purposes of Section 626(d). The preliminary "conciliation" was nothing more than an inquiry as to whether Shell wanted to settle (A. 81, 82), which seems far short of the concerted conciliation efforts which the statute requires of the Department of Labor.[34] Moreover, prior to the receipt of the written notice filed by Mrs. Dartt, the Department not only did not inform Shell that Mrs. Dartt was intending to sue, but affirmatively told Shell that she had not filed a notice of intent to sue (A. 50). Finally, when the Department did receive the written notice from Mrs. Dartt, it did not rely on its prior contacts with Shell as fulfilling either the notice or conciliation functions prescribed by Section 626(d). Instead, it gave Shell written notice of Mrs. Dartt's intended suit, and began to vigorously pursue possible settlement.

Thus, neither the statute, relevant legal precedent, the official administrative interpretation of the requirements of Section 626(d), nor the facts support the conclusion that Shell received the type of notice contemplated by Section 626(d). This being true, the *Burnett* tolling principle is inapplicable to this case.

[34] Cf. *Brennan v. Ace Hardware Corp.*, 495 F.2d 368 (8th Cir. 1974).

III.

COURTS OF APPEAL ARE PROHIBITED FROM SUBSTITUTING THEIR JUDGMENT FOR THE EQUITABLE DISCRETION OF A DISTRICT COURT

The District Court found that Mrs. Dartt did not act reasonably in failing to inquire into what she needed to do in order to protect her rights under the A.D.E.A. The District Court further found that the interests of Shell and the Department of Labor were necessarily prejudiced where no timely Section 626(d) notice is given. Weighing all of these factors, the District Court concluded that it would be "just" to leave Mrs. Dartt to her administrative remedy before the Department of Labor.

The Court of Appeals reached diametrically opposed conclusions from the same set of facts. In the view of the Court of Appeals, Mrs. Dartt acted reasonably in pursuing her rights under the A.D.E.A. and was excusably ignorant of the Section 626(d) requirement. The Court of Appeals further found that the interests of Shell and the Department of Labor were not prejudiced by the failure of Mrs. Dartt to give timely notice of her intention to maintain a private action. The Courts of Appeals therefore concluded that it would be equitable to allow Mrs. Dartt to maintain her private action.

Assuming *arguendo* that equitable considerations come into play in the instant case, it is well-settled that

the exercise of these equitable powers is committed to the sound discretion of the district courts.[55] The review powers of the Courts of Appeals, and of this Court, are "correspondingly narrow,"[56] and are limited to the question of "whether there has been an abuse of discretion."[57] This Court has repeatedly held that the Courts of Appeals may not engage in a *de novo* review of the record and "give the facts another construction, resolve ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent."[58] This Court had defined the proper exercise of discretion as follows:

> The term "discretion" denotes the absence of a hard and fast rule. [citation omitted] When invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.[59]

Here, the District Court carefully weighed all of the circumstances, including the fact that Mrs. Dartt could

[55] *Burns v. U.S.*, 287 U.S. 216 (1932); *Swann v. Charlotte-Mechlenberg Bd. of Educ.*, 402 U.S. 1 (1971); *Lemon v. Kurtzman*, 411 U.S. 192 (1973).

[56] *Lemon, supra*, 411 U.S. at 200.

[57] *Burns, supra*, 287 U.S. at 223.

[58] *U.S. v. National Assn. of Real Estate Bds.*, 339 U.S. 485, at 495 (1950); *U.S. v. Oregon State Med. Soc.*, 343 U.S. 326 (1952); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, at 123 (1969).

[59] *Langnes v. Green*, 282 U.S. 531, at 541 (1931).

still avail herself of the services of the Department of Labor in the investigation and possible litigation of her case. In the exercise of its sound discretion, the District Court properly concluded that the just result under the circumstances would be to leave Mrs. Dartt to the remedy which she had elected to pursue. Such a result gave full effect to the language of the statute; prevented any possible prejudice to Shell or the Department of Labor by virtue of the untimely notice; and did not deprive Mrs. Dartt of a congressionally-approved remedy for her alleged wrongs.

It cannot be said that the District Court abused its discretion, or failed to give due regard to both the f... and the law, nor can it be said that the result which it reached was unjust. The Court of Appeals, in fact, made no finding that the District Court abused its discretion. Instead, the Court of Appeals engaged in an impermissible *de novo* review of the record, construed the facts differently, and found to be sinister facts which the District Court considered innocent.[60]

This Court should adhere to established principles of appellate review, and reverse the decision of the Court of Appeals for failure to accord proper weight to the findings and conclusions of the District Court.

[60] *U.S. v. National Assn. of Real Estate Bds.*, 339 U.S. 485, at 495 (1950). See, e.g., the implicit suggestion that Shell delayed unreasonably in providing requested information to the Department and thereby caused Mr. Speer to delay informing Mrs. Dartt of the notice requirement (A. 35).

CONCLUSION

Based upon the foregoing authorities and arguments, and the record as a whole, it is respectfully submitted that the judgment of the Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

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APPENDIX A

TEXT OF SECTION 626(d), CONTAINED IN S. 830, AS REPORTED OUT BY COMMITTEE, 113 CONG. REC., 31248, 31249

(d) No civil action may be commended by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed —

(1) within one hundred and eighty days after the alleged unlawful practice occurred, or

(2) in a case to which section 13(b) applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by the informal methods of conciliation, conference, and persuasion.

APPENDIX B

TEXT OF SECTION 626(d), CONTAINED IN H.R. 13054, AS REPORTED OUT BY COMMITTEE, 113 CONG. REC., 34739

(d) No civil action may be commenced by any person under this section until the person has given the Secretary not less than sixty days' notice of an intent to file such action. Upon receiving such notice, the Secretary shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

APPENDIX C

TEXT OF SENATE AMENDMENTS TO S. 830, AFTER INITIAL PASSAGE BY THE HOUSE, 113 CONG. REC. 35055

On page 8, beginning with line 21 and continuing through line 2 on page 9, strike all of subsection (d), and substitute in lieu thereof the following:

"(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed —

"(1) within one hundred and eighty days after the alleged unlawful practice occurred, or

"(2) in a case to which section 14(b) applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion."

On page 9, beginning with line 3 and continuing through line 2 on page 10, strike all of subsection (e) and substitute in lieu thereof the following:

"(e) Sections 6 and 10 of the Portal-to-Portal Act of 1947 shall apply to actions under this Act."

On page 10, line 10, strike the word "The" after "Sec. 9." and insert in lieu thereof the following:

"In accordance with the provisions of subchapter II of chapter 5 of title 5, United States Code, the".

On page 17, line 5, strike the word "sums" and insert in lieu thereof the following: "sums, not in excess of $3,000,000 for any fiscal year,"

APPENDIX D

TEXT OF SECTION 7 OF PROPOSED AMENDMENTS BY SENATOR JAVITS TO S. 830, WHILE IN COMMITTEE, 113 CONG. REC. 7077

"LIABILITY

"Sec. 7.(a) Any person who violates the provisions of section 4 of this Act shall be liable to any employee or applicant for employment affected in the amount of the compensation which would have been paid to him had no violation of this Act occurred, and in the case of willful violation of this Act, in an additional equal amount as liquidated damages. An action to recover such liability and for such equitable relief as may be appropriate, including, without limitation, a judgment compelling reinstatement, promotion, or hiring, may be maintained in any court of competent jurisdiction by any one or more employees or applicants for employment for and in behalf of himself or themselves and other employees or applicants for employment similarly situated. But no such action shall be commenced by or on behalf of any employee or applicant for employment until 60 days after a charge relating to the unlawful acts upon which the action is based has been filed with the Secretary by or on behalf of such employee or applicant for employment. No employee or applicant for employment shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The right provided by this subsection of an employee or applicant for employment to bring or join in an action shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 8,

but only to the extent of the relief sought on behalf of such employee or applicant for employment in such action.

"(b) In any action brought under this section the court shall allow to the plaintiff, if the prevailing party, reasonable attorney's fees as part of the costs.

"(c) Any action authorized by this section may be commenced within 2 years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within 3 years after the cause of action accrued. Any such action not commenced within the period authorized by this section shall be forever barred.

NO. 76-678

Supreme Court, U. S.
FILED
JUL 19 1977
MICHAEL RODAK, JR., CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1976

SHELL OIL COMPANY,
Petitioner

v.

ANNE M. DARTT,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

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NO. 76-678

In The Supreme Court of the United States

OCTOBER TERM, 1976

SHELL OIL COMPANY,
Petitioner

v.

ANNE M. DARTT,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The decision of the United States District Court for the Northern District of Oklahoma is not reported but is unofficially reported at 10 FEP Cases 844 (N. D. Okla. 1975) (A. 10-25).[1] The opinion of the United States Court

[1] References to the Appendix are designated as (A. (page)).

of Appeals for the Tenth Circuit is reported at 539 F.2d 1256 (A. 26-36) (10th Cir. 1976). The Order denying the Petition for Rehearing was not reported. (A. 37)

JURISDICTION

The Tenth Circuit Court of Appeals decision was filed on July 22, 1976, and, thereafter, a Petition for Rehearing was filed on August 3, 1976, and denied on August 19, 1976, and the Petition for Certiorari was filed on November 15, 1976.

28 U.S.C. § 1254 (1) is the basis for the jurisdiction of this Court.

QUESTIONS PRESENTED

1) Whether the requirement under 29 U.S.C. § 626(d) that the Notice of Intent to Sue be given within 180 days is jurisdictional so as to bar equitable relief to a claimant under proper circumstances.

STATUTES INVOLVED

This case involves the interpretation and application of Section 626 of the Age Discrimination in Employment Act (29 U.S.C. § 626 (d)) The text of that statute has been set forth by petitioner (p. 3 of petitioner's brief) and is therefore not repeated here.

STATEMENT OF THE CASE

Respondent filed an action in the United States Dis-

trict Court for the Northern District of Oklahoma against her former employer, the Shell Oil Company, under Section 7(b) of the Age Discrimination in Employment Act of 1976 (hereinafter the Act or ADEA,[2] and Section 16(b) of the Fair Labor Standards Act of 1938.[3] Plaintiff charged defendant with certain unlawful employment practices based on age, including specifically the act of discharging her in violation of the ADEA. Accordingly, plaintiff sought an injunction in the District Court which would require the defendant to reinstate her, as well as damages which she had suffered by reason of her unlawful discharge together with costs and attorneys fees.

The United States District Court for the Northern District of Oklahoma held that it lacked subject matter jurisdiction, because plaintiff had not strictly complied with the procedural timetable set out in Section 7(d) (1) of the ADEA with respect to filing a "Notice of Intent to Sue" with the Secretary of Labor "within one hundred and eighty days after the alleged unlawful practice occurred," and dismissed plaintiff's action. In so doing, the District Court also ruled that plaintiff's prompt complaint to the United States Department of Labor, made within

[2] Act of December 6, 1976, Public Law 90-202, 81 Stat. 602, as amended; 29 U.S.C. § 621 *et seq.*

[3] Act of June, 25, 1938, c. 676, 52 Stat. 1060, as amended; 29 U.S.C. § 201 *et seq.* Section 7(b) of the ADEA [29 U.S.C. § 626(b)] incorporates by reference the civil enforcement provisions of the Fair Labor Standards Act, including Section 16(b) of that act [29 U.S.C. 216(b)].

nine days of her discharge, even when considered in conjunction with her subsequent formal notification, neither satisfied nor tolled the ADEA notice requirement on equitable grounds.

On appeal to the Tenth Circuit Court of Appeals, the Tenth Circuit held that while the Notice of Intent to Sue was required, the one hundred and eighty day limitation period within which the Notice of Intent to Sue was required to be filed was subject to equitable tolling and held that plaintiff's actions entitled her to equitable relief.

STATEMENT OF FACTS

Mrs. Anne M. Dartt was employed by the Shell Oil Company at its Credit Card Center in Tulsa, Oklahoma, from January 3, 1966, until July 30, 1973 (A. 4). At the time of her discharge, she was 51 years of age (A. 46). and employed as a Senior Credit Analyst (A. 4).

On August 9, 1973,[4] nine days after her termination, Mrs. Dartt visited the Tulsa, Oklahoma, office of the Wage and Hour Division, U.S. Department of Labor, and spoke with its Assistant Area Director, Mr. J. Dean Speer (A. 42-43), 53). Mrs. Dartt complained that she had been fired by Shell due to her age (A. 5, 58). As she explained to the court below, her belief that she had been unlawfully dis-

[4] The court below, based on the mistaken testimony of Mrs. Dartt (A. 40), used the date September 9, 1973. The correct date is August 9th (A. 50, 53), as the court apparently recognized during the course of the evidentiary hearings (A. 53).

charged was based on a statement made to her by her supervisor that she had "no potential because of (her) age" (A. 46). Mr. Speer told her that, "on the face of it, it appears that you have a right to complain, and I'll investigate, and I will let you know. (A. 43). First, however, because of what Mr. Speer considered to be a good working relationship with the Shell Oil Company (A. 55, 63), he immediately undertook to conciliate the matter (A. 59, 63). Indeed, as he testified, he called Shell "that very afternoon" and informed one of its representatives — a Mr. Frank Thompson — of the receipt of Mrs. Dartt's age discrimination complaint (A. 50). The next day, August 10, this information was relayed by Mr. Thompson to Mr. Kenneth E. Jacobs (A. 50), Shell's Manager for Employee Relations, whose equal employment duties with Shell also involve the ADEA.

On September 4, 1973, Mr. Jacobs addressed a letter to Mr. Speer enclosing some materials he had requested relating to the employment of Mrs. Dartt and all other employees classified as Senior Credit Analysts as of the date of her discharge (A. 77). Mr. Speer continued his conciliation effort by meeting with Mr. Jacobs on October 31, 1973 (A. 77), but, as he testified, he "was unsuccessful. (A. 55). He then assumed an "investigative posture".

In November, 1973, Mr. Speer obtained a promise from Shell that it would "make some internal studies and develop some statistical information" as he had re-

quested, but this promise was never kept (A. 55).

As the Court below found, Mrs. Dartt called Mr. Speer several times to inquire about the status of the matter (A. 43-44). Each time she was informed that she would be notified as soon as any action was taken (A. 43). Unfortunately, however, she was not advised of her private right to bring a civil action under the ADEA or of the 180-day notice requirement during any of her several contacts with Mr. Speer (A. 44). Once such call was made on January 21, 1974 (A. 78); her last call was made on March 1, 1974 (A. 78). Thereafter, on March 5, 1974, Mr. Speer informed Mrs. Dartt by letter that "there will be a delay *in completing* this investigation" and notified her of the private right to sue under the Act (A. 78). Enclosed with the letter was an explanatory pamphlet entitled "Age Discrimination in Employment Act" (A. 78), which states in pertinent part:

> "Before an individual brings court action, he must give the Secretary not less than 60 days' notice of his intention. This notice must be filed within 180 days of the occurrence of the alleged unlawful practice. * * * The law provides that after receiving such a notice, the Secretary will notify the prospective defendants and try to eliminate any alleged unlawful practice by informal conciliation, conference, and persuasion. [Wage-Hour Publication No. 1230 at p. 4 (1971)]

At trial, Mrs. Dartt stated that this constituted her first actual knowledge of her right to maintain a private ADEA action and of the Act's 180-day notice requirement (A.

43). Promptly, therefore, upon receipt of the letter and pamphlet, she contacted and retained private counsel (A. 44). On March 14, 1974 (i.e., 216 days after discharge), her attorney mailed a letter to the Labor Department's office in Tulsa, Oklahoma, for the attention of Mr. Speer, giving notice that Mrs. Dartt intended to commence a civil action under the ADEA against the Shell Oil Comapny (A. 7).

Based on this formal notification, and in accordance with internal Labor Department procedures, Mr. Speer "attenipted to reconciliate or get back into the conciliation procedure under our responsibilities when we receive Notice of Intent to Sue" (A. 55). Thus, on March 15, 1974, Mr. Speer sent out two letters: one to Mrs. Dartt's attorney, acknowledging receipt of the Notice of Intent to Sue; and the other to Shell's Manager for Employee Relations, informing him of the receipt of Mrs. Dartt's Notice of Intent to Sue (A. 78). Each letter also outlined the Labor Department's procedures for attempting to conciliate and setttle the matter (ibid.). Thereafter, following conversations with Mrs. Dartt regarding terms of settlement agreeable to her, Mr. Speer met with Shell's Manager for Employee Relations to discuss the Possibility of mediating or settling Mrs. Dartt's age discrimination complaint (A. 78). Again, on May 14, 1974, Mr. Speer talked with Shell's Employee Relations Manager as to the possibility of settling the matter (A. 79). This second conciliation effort also "proved

unsuccessful" (A. 79). Therefore, by letter dated May 16, 1974, Mr. Speer notified Mrs. Dartt's attorney that attempts to conciliate her complaint had been unsuccessful and that she was free to take whatever action she thought advisable (A. 79).

This ADEA action was filed by Mrs. Dartt's attorney on May 21, 1974 (A. 1, 2); that is, more than 60 days after giving formal notice of an intent to sue the Shell Oil Company. The complaint sought an injunction requiring defendant Shell to reinstate plaintiff Dartt in its employ, and the recovery of sums due plaintiff by reason of her unlawful discharge, together with costs and attorney fees (A. 2-6). On June 11, 1974, defendant filed a motion to dismiss for failure to state a cause of action (A. 1,8).

In order to develop the facts necessary to resolve the questions raised by defendant's motion to dismiss, the district court held two evidentiary hearings (A. 11). The principal witnesses were plaintiff Dartt (A. 40-49), defendant's Manager for Employee Relations, Mr. Jacobs (A. 50), and Mr. Speer from the Labor Department (A. 53-67). The latter's testimony was generally limited to questions concerning the timing of Mrs. Dartt's discrimination complaint and her notice of intent to sue. On February 6, 1975, the district court granted defendant's motion to dismisss (A. 10-25).

In dismissing the action, the district court ruled that it lacked subject matter jurisdiction, becuase the plaintiff had

not strictly complied with the procedural timetable set out in Section 7(d)(1) of the ADEA for notifying the Secretary of Labor of an intent to sue "within one hundred and eighty days after the alleged unlawful practice occurred." It also held that timely filing of the required notice was a jurisdictional prerequisite to the maintenance of a private ADEA action (A. 10-25).

The court further ruled that plaintiff's age discrimination complaint — although made to the local Labor Department Wage-Hour office shortly after her discharge — technically did not satisfy the ADEA Section 7(d)(1) requirement that a "notice of intent to sue" be filed with the Secretary of Labor. Describing the pertinent statutory language as clear and unambiguous, the court held that it was without authority to accept a mere complaint in satisfaction of the formal notice mandated by the Act (A. 18).

Finally, the lower court declined to view Mrs. Dartt's formal notification as relating back to the original filing of her complaint. Instead, it construed Section 7(d)(1) so strictly as to defeat any and all of the equitable grounds offered by plaintiff for tolling the 180-day notice requirement. Thus, despite the fact that the defendant — well within the 180-day period — had received actual notice and an opportunity to conciliate the asserted violation, the court ruled that the purposes of the Act had somehow not been satisfied (A. 10-25).

Respondent's Complaint was dismissed by the district

court on February 6, 1975, and respondent thereafter perfected her appeal to the Tenth Circuit Court of Appeals, and on July 22, 1976, that court entered an order reversing the judgment of the district court and holding that plaintiff's actions in attempting to promptly pursue her remedy under the ADEA had resulted in the *de facto* fulfillment of the main purposes of the Act and held the time limitation (180 days) was tolled until the filing of respondent's Notice of Intent to Sue.

ARGUMENT

I.

THE 180-DAY LIMITATION PERIOD CONTAINED IN SECTION 626(d) WITHIN WHICH THE 60-DAY NOTICE OF INTENT TO SUE NOTICE MUST BE GIVEN IS SUBJECT TO EQUITABLE MODIFICATION.

The real question in this case is not whether the 60-day notice of intent to sue is a prerequisite to suit, since all of the cases seem to agree that it is. The real question is whether the 60-day notice must be given within a 180-day limitation.

The Tenth Circuit Court of Appeals below very properly recognized that the 60-day notice was a prerequisite to the right to bring a civil action, but recognized that since the 60-day notice of intent to sue was given within 216 days rather than within 180 days, that the equitable circumstances prevailing in this case required equitable modi-

fication of the 180-day limitation period.

A. The ADEA is a Remedial and Humane Act Which Should be Liberally Construed to Effectuate the Purposes of the Act.

That the ADEA itself recognized that the equitable powers of the Court may be necessary to effectuate the purposes of the Act can hardly be denied in view of the fact that 29 U.S.C. § 626(b) and (c) provided that:

> "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such *legal and equitable relief as will effectuate the purposes of this Act*."

The court took note of these provisions in the case of *Ott v. Midland-Ross Corp.*, 523 F.2d 1367 (6th Cir., 1975); where the Sixth Circuit applied equitable relief because of the fact that the respondent had practiced fraud on the plaintiff in inducing him to give up certain rights under the Act. The Sixth Circuit in *Ott* found no difficulty in tolling the two-year limitation period of the ADEA (Portal to Portal Act, 626 U.S.C.A § 255). There thus appears no logical reason for tolling the two-year statute but refusing to toll the 180-day period.

Certainly we are here concerned with a remedial statute as was recognized in the case of *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir., 1970), and the manner in which statutes of limitations have been applied in dealing with remedial and humane statutes is demonstrated in the case of *Burnett v. New York*

Central R. R. Co., 380 U.S. 424, 13 L.Ed. 2d 941, 85 S.Ct. 1050 (1965), where the court was dealing with the Federal Employer's Liability Act.

The defendant Shell has contended (D.B. 30-31)[3] that the time restriction contained in the statute constitutes a limitation on the right itself, and that it is subject to more strict construction than the ordinary statute of limitations. This is contrary to the holding in *Burnett* where the court stated:

> "The fact that the right and limitation are written into the same statute does not indicate a legislative intent as to whether or when the statute of limitations should be tolled."

While Burnett went on to recognize the policy of repose inherent in statutes of limitations, it recognized that this policy may be outweighed in proper circumstances where the court in dealing with this problem stated:

> "This policy of repose designed to protect defendants is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights."

The court in *Burnett* further held that in order to determine the Congressional intent it is necessary to examine the purposes and policies underlying the limitational provision, the Act itself and the remedial scheme developed for the enforcement of the rights given by the Act. The court after citing authorities on this question then stated:

> ". . . These authorities indicate that the basic inquiry is whether Congressional purpose is effectuated by tolling the statute of limitations in given circumstances."

[3] References to the Defendant's Brief are designated as (D.B. (page)).

Because of the similarities between the ADEA and Title VII of the Civil Rights Act of 1964, the courts have frequently referred to interpretations of provisions in Title VII for assistance in defining analogous sections of the ADEA. *Moses v. Falstaff Brewing Corporation*, (8th Cir.) 525 F.2d 92; *Curry v. Continental Airlines*, (9th Cir.) 513 F.2d 691; *Goger v. H. K. Porter Company, Inc.*, (3rd Cir.) 492 F.2d 13.

In Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, the court in dealing with a Title VII time period, held:

> "The *ratio decidendi* in the leading cases dealing with timing requirements, in general, under the Act compels the conclusion that the 90-day requirement (amended in 1972 to 180 days) is not 'jurisdictional' in the sense that complicance with it *vel non* determines the jurisdiction of the district court, without respect to any of the other circumstances in a particular case. We accept the view that the requirements should be analogized to statutes of limitations. Equitable modifications, such as tolling and estoppel, that are applied to them, should also be applied here."

Also holding thta equitable consideration will toll the time limitations established by Title VII are *Culpepper v. Reynolds Metals Co.*, (5th Cir.) 421 F.2d 888 and *Antonopulos v. Aerojet-General Corp.*, E.D. Cal. 295 F.Supp. 1390.

Cited, also, in the *Reeb* case were *Love v. Pullman Co.*, 404 U.S. 522, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972), which held that a complaint filed with the EEOC without first filing with the state as required by Title VII could be held in abeyance and considered after the state court had declined to take action, thus indicating the liberal construction of the statute and thus establishing the time limitation for filing a complaint to be directory rather than mandatory. The *Reeb* court went on to point out that remedial legislation, such as Title VII of the Civil Rights Act of 1964, is entitled to the benefit of liberal construction.

In the same vein, the Tenth Circuit Court of Appeals in *Love v. Pullman, supra*, approved liberal construction where the court in considering the procedural technicalities of Title VII state:

> "Such technicalities are particularly inappropriate in the statutory scheme in which laymen unassisted by trained lawyers initiate the process."

In another ADEA casa, *Skoglund v. Singer Co.*, 403 F.Supp. 797 (U.S.D.C. N.H., 1975) the court held that claimant's failure to file a Notice of Intent to Sue within 180 days was not jurisdictional and could be excused on equitable principles. The court there state:

> "Remedial legislation should not be so narrowly read as to preclude achievement of its purpose; form should not be raised over substance.
>
> "Limitations which would take away a right from one

> for whom the statute was enacted have been required to be expressed and not subject to varying interpretations."[6]

The *Skoglund* court pointed out that there was no indication from the words of 29 U.S.C. § 626(d) that the 180-day notification requirement was "jurisdictional" in the sense that compliance with it or lack thereof determines, without regard to other circumstances, the jurisdiction of a federal court. In closing the court stated:

> "As noted above, ADEA is remedial legislation. It is therefore entitled to a broad reading. It creates rights in a class of employees, the elderly employed, and it places a burden on employers to inform that class of their rights."

While as noted by the Tenth Circuit in the opinion below (A. 31) the term "jurisdictional" has been loosely used, several courts while holding that the failure to file within the 180-day period was jurisdictional, have nevertheless recognized equitable principles could apply under proper circumstances. In *Rucker v. Great Scott Supermarket*, 528 F.2d 393 (6th Cir. 1976) the claimant gave the Secretary of Labor only two-days notice of intent to file suit. The court then held that notice of intent to file suit is a jurisdictional prerequisite, but did not hold that the

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[6] *Woodford v. Kinney Shoe Corp.*, 369 F. Supp. 911 (N.D. Ga. 1973) Cf.; *Evans v. Sheraton Park Hotel*, 164 U.S. App. D.C. 86, 503 F.2d 177 (1974); *EEOC v. Wah Chang Albany Corp.*, 499 F.2d 187 (9th Cir., 1974); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970).

failure to file it within 180 days would require dismissal of the claimant's suit. The settlement thus recognized that equitable principles could apply, but held that the action in question could not be held to be compliance with the statute "absent a showing of special facts warranting granting of equitable relief."

And, in *Hiscott v. General Electric Co.*, 521 F.2d 32 (6th Cir. 1975) the court, once again, recognized that the notice of intent to sue was jurisdictional, but since it was never given, they were not required to determine if the 180-day period within which it was to be given was subject to equitable tolling.

In *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir. 1974) the court, once again, loosely used the term "jurisdictional" in speaking of the notice requirement. Once again, the case held that filing the Notice of Intent to Sue is the prerequisite to the right to file any suit under the ADEA. It did not hold that the failure to file it within 180 days, however, was jurisdictional.

In the *Powell* case, the court noted that the claimant was specifically advised eleven days after the act of discrimination to note the specific time limits within which she could file her suit. She was also advised of her rights again some four months later. The Fifth Circuit therefore refused equitable relief.

The Eighth Circuit, in considering whether equitable principles should apply to the ADEA considered this question in *Moss v. Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975) where the employee was notified on November 12, 1973, that she no longer had a job but was not administratively terminated until November 30, 1973, having not worked after November 16, 1973. In making the determination of when her discharge occurred in applying equitable principles so as to bring her within the statute, the court state:

> "The Age Discrimination Act is remedial and humanitarian legislation. It is to be construed liberally to achieve its purpose of protecting older employees from discrimination."[7]

The court went on to point out in *Moses* that the strict interpretation contended for by respondent would not "further some substantial goal of the Age Discrimination Act" and held that the 180-day notice requirement was intended to serve the purposes of the Act by insuring that the Secretary of Labor is called in for conciliation purposes. The court further held that the failure of the ADEA to define the specific time when an alleged unlawful practice occurs is tantamount to a procedural ambiguity which should be construed in favor of the plaintiff party.

This case bears a striking similarity to the case at bar where plaintiff was discharged on July 31, 1973, (A. 40)

[7] "A procedural requirement of the Act of doubtful meaning in the given case should not be interpreted to deny an employee a claim for relief unless to do so would clearly further some substantial goal of the Act" (id. 914-915).

but received an additional twenty-four weeks wages from which the employer deducted taxes which would have paid her up through December 31, 1973 (A. 48).

B. Plaintiff's Notice Accomplished the Purpose Which the 60-Day Notice of Intent to Sue Was Designed to Do.

At the onset we note that the defendant actually had two notices of plaintiff's complaint. The first was transmitted to them within a few day of plaintiff's termination and the second when plaintiff's formal Notice of Intent to Sue was served upon the Labor Department. In both instances, the Department of Labor attempted to mediate the differences between the parties. Thus, the defendant had two chances to avoid litigation.

The Tenth Circuit in its opinion (A. 35) has noted the two basic purposes behind the 180-day notice requirement, which are:

1. To provide the Labor Department with an opportunity to achieve a conciliation of the complaint while the complaint is still fresh.
2. To give early notice to the employer of a possible lawsuit, so as to promote both the preservation of the evidence and good faither negotiating on the part of the employer during the conciliation period.

As the Tenth Circuit noted in its opinion (A. 35), both of these purposes were fulfilled in spite of the filing of the Notice of Intent to Sue on the 216th day following plaintiff's termination.

It is settled law that the running of a statutory time limitation will be suspended if "tolling the limitation in a given context is consonant with the legislative scheme. *American Pipe & Construction Co. v. State of Utah*, 414 U.S. 538 (1974). "The basic inquiry is whether Congressional purpose is effectuated by tolling * * * in given circumstances." *Burnett v. New York Central R.R. Co., supra*. "In order to determine Congressional intent, we must examine the purposes and policies underlying the limitation provision, the Act itself and the remedial scheme developed for the enforcement of the rights given by the Act."(Ibid)"Finally, and perhaps most importantly; (where) the tolling effect (is sought to be) given to (any) timely prior filings "under a particular Act, it is essential that" the prior filings in each case necessarily operated to avoid the evil against which the "time limitation" was designed to protect." *(Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 1723-1724, 44 L.Ed.2d 295, 305-306 (May 19, 1975)

The basic purposes of the 180-limitation period were fully satisfied in the case at bar. Shell received prompt notice of violation asserted by Mrs. Dartt following her discharge on July 31, 1973 where within two weeks of the date of her discharge it knew of her complaint to the Labor Department's locai Wage and Hour office, that she had been discharged in violation of the ADEA. Shell was given every opportunity to effect voluntary compliance through

the conciliation effort of the Labor Department in Tulsa. It is important to note that conciliation was undertaken by the Labor Department, not once, but twice.

Shell had all of the "protection" contemplated by the Act's notice requirement provided in Sec. 7(d). It had, to use the language of the Supreme Court in *Johnson v. Railway Express Agency, supra.*:

> "The opportunity to protect itself against the loss of evidence, the disappearance and fading memories of witnesses, and the unfair surprise that could result from the sudden revival of a claim that long has been allowed to slumber."

It seems evident that in view of the Labor Department's extended efforts to conciliate Mrs. Dartt's claim, the defendant received far more notice of the asserted violation and a far greater opportunity to settle it through informal methods than was ever intended by Congress as a prerequisite to the maintenance of a private ADEA action.

It was the intent of Congress that the responsibility for enforcement vested in the Secretary of Labor by Section 7 be initially and exhaustively directed through informal methods of conciliation, conference and persuasion and formal methods applied only in the ultimate sense. (H.R. Rep. No. 805, 90th Cong., 1st Session 1967) P. 5 reprinted in the 1967 U.S. Code Cong. and Admin. News 2213, 2218. See, also, virtually identical language in S. Rep. No. 723, 90th Cong. 1st Session (1967) at P. 5, re-

printed in 113 Cong. Rec. 31250, column 3 (Nov. 6, 1972) In the instant case, this Congressional directive was followed to the letter.

It is clear from the record, except for the technicality of having in the end a formal "Notice of Intent to Sue," the Labor Department promptly and fully complied with the requirements of Sec. 7(d) in the instant case.

The trial court's view that the humanitarian and remedial purposes of the ADEA are outweighed by the policy of the Act to give employers prompt notice of their status as potential defendants can not be squared with the Supreme Court's statement in *Burnett v. New York Central R.R. Co., supra,* concerning the Federal Employer's Liability Act, that "The humanitarian purpose of the (Act) makes clear that Congress would not wish a plaintiff deprived of his rights when no policy underlying the statute of limitations is served in doing so." (id. at 434)

The defendant relies heavily on the cases of *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 and *Electrical Workers v. Robbins & Myers, Inc.*, U.S. , 97 S.Ct. 441 (1976), while contending that the pursuit of alternative remedies does not toll a statute of limitations. These cases are easily distinguishable in that the plaintiff's actions in each case did not serve the purpose of the Act. Thus, in *Electrical Workers v. Robbins & Myers, supra,* invocation of the grievance process did not satisfy the policies underlying the statutory limitations period, but, in

fact, the plaintiff was asserting these statutory claims in a different forum and was asserting an independent claim based on a *contract right*. As this court pointed out in the *Electrical Workers* opinion:

> "Adherence to the limitations period assures prompt notification to the employer of a charge of an alleged violation of Title VII * * *. The grievance process assures no such comparable notice. In the instant case, the grievance alleged only an 'unfair action.' Even if racial discrimination is explicitly discussed, however, the grievance procedure properly involves only *contractual* questions, and would, but fortuitously, implicate the Title VII standards." (*Alexander v. Gardener-Denver Company*, 415 U.S. 436; *Johnson Railway Express Agency, Inc.*, 421 U.S. 454)

And in *Johnson v. Railway Express Agency, Inc.*, *supra*, this court held that the timely filing of a charge with the EEOC pursuant to Section 706 of Title VII did not toll the running of the statute of limitations applicable to an action, based upon the same facts, under 42 U.S.C. § 1981. In reaching that conclusion, the court stated:

> "Perhaps most importantly, the tolling effect given to the timely prior filings in *American Pipe* and in *Burnett* depended heavily on the fact that those filings involved exactly the same cause of action as subsequently asserted. This factor was more than a mere abstract or theoretical consideration, because the prior filing in each case necessarily operated to avoid the evil against which the statute of limitations was designed to protect."

It is important to note that, by contrast to these

cases, respondent Dartt filed an administrative complaint under the ADEA within nine days of her discharge. (A. 53) Shell received notice of respondent's complaint the same day and a Labor Department representative commenced conciliation efforts under the ADEA almost immediately. Respondent's present suit is based upon the same cause of action as the earlier conciliation efforts, and involves the same allegations. It can thus be readily seen that unlike the cases of *Robbins & Myers* and *Johnson v. Railway Express Agency* that respondent fulfilled the policies and purposes underlying the Notice to Sue provisions of the ADEA. We submit that this was correctly recognized by the Tenth Circuit Court of Appeals below.

C. Private Actions Under the ADEA are Much to be Desired to Effectuate the Overall Scheme and Purpose of the Act.

According to the *amicus curid* brief of the Labor Department complaints filed with the Secretary of Labor in fiscal years 1973, 1974, 1975 and 1976 numbered respectively 2208, 3040, 4117 and 5824, *United States Department of Labor, Age Discrimination in Employment Act of 1967: A Report Covering Activities Under the Act During 1975*, p. 6 (1976) ("Age Discrimination Report").

From these figures alone, one can readily see that the Secretary of Labor can not possibly process all of the claims that are filed. It is a sad commentary on the Act that through the end of 1975 (according to the Secretary

of Labor's *amicus curiae* brief) more than one-half of all reported private actions under the ADEA have been dismissed by the district courts on procedural grounds. *Age Discrimination Report, supra,* p. 14. Of this, almost one-third of all cases were dismissed, at least in part, because of the failure to strictly comply with the notice provisions of the ADEA. Thus, it is readily apparent that a strict construction of the Act completely defeats the true purpose of the Act. Thus, we have the situation where Congress passed an Act purportedly to remedy age discrimination in employment for the benefit of our aging and senior citizens and where the courts have by their strict construction of the 180-day limitation period almost completely defeated the purposees of the Act and rendered ineffective one of the most important enforcement provisions of the Act.

D. The Legislative History of the Act Indicates That Congress Did Not Intend the Notice to Supervision to Operate as an Inflexible Time Limitation on the Maintenance of Private Enforcement Actions.

In enacting the ADEA, Congress accepted the administration's proposal that complaints of age discrimination in employment, like claims of discrimination covered by Title VII, be dealt with initially with efforts directed toward conciliation. It did, however, refuse to incorporate into the ADEA the post-conciliation enforcement procedures contained in Title VII. 113 Cong. Rec. 2794-2796 (1967). As Congress was concerned that the delays which

have plagued the implementation of Title VII did not occur under the ADEA, it therefore incorporated into the Act many of the enforcement procedures of the Fair Labor Standards Act of 1938. 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*, which involved somewhat greater emphasis on relief via the courts than is contemplated by Title VII. E. G., 113 Cong. Rec. 7076 (1967), (remarks of Senator Javits).

The primary reason for incorporating the enforcement procedures of the Fair Labor Standards Act into the ADEA as explained by Senator Javits was to avoid the procedural delays and difficulties being encountered by other discriminitees proceding through the Equal Employment Opportunity Commission and Title VII. Such procedural obstructions, "which plague so many of our agencies such as the EEOC," were left to be "particularly" unfortunate "in the case of older citizens to whom, by definition, relatively few productive years are left." *Statement of Senator Javits at hearings before the Subcommittee on Labor of the Committee of Labor and Public Welfare,* U.S. Senate, on S. 830, S. 788, to prohibit age discrimination in employment. 90th Cong., 1st Sess. at 24 (1967); also, 113 Cong. Rec. 7076. Thus, the Bill, is finally an Act that was intended to give aggrieved individuals an easier and more direct access to the courts after the expiration of an initial 60-day period during which the Secretary of Labor is required to attempt settlement of the complaint.

The Senate report indicates that the purpose of the intervening notice of intent to sue "is to allow time for the Secretary to mediate the grievance" and "to provide time for the Secretary, by informal methods, to bring about compliance with the Act." S. Rep. No. 723, 90th Cong., 1st Sess. at 5 (1967); also at 113 Cong. Rec. 31250-31251.

Thus, it is quite evident that the ADEA's 180-day notice provision was adopted as a means of accommodating the incorporated Fair Labor Standards Act and Portal-to-Portal Act provisions to the Title VII concept of initial administrative conciliation efforts. Where notice of intent to sue, like the Title VII charging requirement from which it was copied, "is not filed as a preliminary to a lawsuit. On the contrary, the purpose of a charge (here, notice) is to trigger the investigatory and conciliatory procedures of the EEOC (here, the Secretary of Labor) once a charge (notice) has been filed, the Commission (the Secretary) carries out its investigatory function and attempts to obtain voluntary compliance with the law." *Sanchez v. Standard Brands, Inc.*, 431 F(2) 455, 466 (C.A. 5th, 1970).

It is thus clear that the purpose of the 180-day notice was to speed up the conciliation and enforcement procedures contemplated by the ADEA and thereby to eliminate the delays which discriminates proceeding under Title VII had encountered in bringing their cases to the courts. This acceleration was to be accomplished by causing complainants to make prompt reports of violations to the Secretary

of Labor so that he could mediate the claims while they were still fresh.

It is therefore fully agreed that filing a Notice of Intent to Sue is, indeed, a jurisdictional prerequisite: i.e., no private ADEA action may be brought if the Secretary of Labor is not first afforded appropriate notice and an opportunity to conciliate asserted violations, and it was so held by the Tenth Circuit Court of Appeals in its opinion below. (539 F(2) 1256) (A. 26-36) It does not automatically follow, however, that the 180-day period for filing the requisite notice should similarly be read as jurisdictional in nature.[8]

The ADEA, unlike Title VII, contains its own express statute of limitations, which is identical in scope to that of the Fair Labor Standards Act. It is therefore unreasonable to assume that Congress intended to condemn the cause of action of an aged worker to a shorter life span than that of other causes of action arising under the Fair Labor Standards Act. (e.g., the so-called "equal pay" provisions which proscribe discrimination in pay based on sex, 29 U.S.C. § 206(d), without saying more than that the

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[8]Thus, see the statement of Labor Department Assistant Area Director Speer that,

> "the department's position was that the 180 days was not jurisdictional." (A. 59) As the Supreme Court has so often stated: "The administrative interpretation of the Act by the enforcing agency is entitled to great deference."

Griggs v. Duke Power Co., 401 U.S. 424, 433-434 (1971), involving Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

older worker must bring his or her cause of action to the attention of the Secretary of Labor within 180 days of the occurrence of the alleged unlawful act. Rather, bearing in mind the Congressional concern for the speedy determination of the rights of older workers, expressed by incorporating the enforcement provision of the Fair Labor Standards Act, it is more in keeping with the intent of the ADEA that the 180-day period be treated as directory in nature. That is, a complainant must show, in the first instance to the Secretary of Labor, and then to the courts, extenuating circumstances which sufficiently justify avoidance of the requirement.

It is therefore submitted that the district court was not automatically and irrevocably divested of subject matter jurisdiction by plaintiff's failure to file a formal Notice of Intent to Sue within 180 days after her discriminatory discharge. Based on the facts established at the evidentiary hearings already held and in light of the ADEA's remedial and humanitarian intent, the reasons offered by plaintiff for her delayed filing were sufficient to toll the 180-day limitation period.

CONCLUSION

The Tenth Circuit Court of Appeals reached the right conclusion in holding that the 180-day period within which to file the 60-day Notice of Intent to Sue was properly tolled by equitable principles. The judgment of the Circuit Court of Appeals should be affirmed.

Respectively submitted,

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APPENDIX A

Age Discrimination Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602, as amended; 29 U.S.C. 621 *et seq.*

SEC. 7(b). The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedure provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): *Provided:* That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

SEC. 7(c). Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable lief as will effectuate the purposes of this

Act: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.

SEC. 7(d). No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed —

(1) within one hundred and eighty days after the the alleged unlawful practice occurred * * *

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

SEC. 7(e). Sections 6 and 10 of the Portal-to-Portal Act of 1947 shall apply to actions under this Act.

APPENDIX B

Fair Labor Standards Act of 1938,
c. 676, 52 Stat. 1060, as amended;
29 U.S.C. 201 *et seq*.

SEC. 16(b). Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to

become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act by an employer liable therefor under the provisions of this subsection.

APPENDIX C

Portal to Portal Act of 1947, Pub.
L. No. 80-49, 61 State. 84, as amended;
29 U.S.C. 251 *et seq*.

SEC. 6 STATUTE OF LIMITATIONS. — Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for unapid minimum liquidated damages, under the Fair Labor Standards Act of 1938, as amended, * * *

(a) if the cause of action accrues on or after the date of the enactment of this Act — may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued; * * *

Supreme Court, U. S.
FILED
OCT 31 1977
MICHAEL RODAK, JR., CLERK

NO. 76-678

In The Supreme Court of the United States

OCTOBER TERM, 1976

SHELL OIL COMPANY,
Petitioner

v.

ANNE M. DARTT,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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NO. 76-678

In The Supreme Court of the United States

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SHELL OIL COMPANY,
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v.

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

I. NEW ISSUES PRESENTED

There were several new issues presented by the Respondent, Mrs. Dartt, which Shell Oil Company believes warrant reply, as well as several new decisions and recent legislative developments which Shell believes should be

brought to the attention of this Court. The new issues are:

A. Whether this Court should reject the new issue raised by Mrs. Dartt as to the effective date of her termination.

B. Whether the mere receipt and processing by the Labor Department of the oral complaint by Mrs. Dartt failed to satisfy either the notice or conciliation requirements of Section 626(d).

C. Whether, contrary to the assertions by Mrs. Dartt, the District Court considered equitable factors in reaching its decision.

II. PERTINENT ADDITIONAL FACTS

In her brief, Mrs. Dartt asserts that her initial oral complaint was sufficient to satisfy the notice and conciliation purposes of Section 626(d). Mrs. Dartt asserts that the notice requirements of Section 626(d) were fulfilled when she registered her complaint, because this complaint allowed both the Labor Department and Shell to become aware of her claim. Mrs. Dartt asserts that the conciliation requirements of Section 626(d) were likewise fulfilled, because the Labor Department made an early initial attempt to see if her claim could be settled.

However, the record establishes that, when the Labor Department received her complaint and started processing it, the Labor Department investigator did not believe that such complaint constituted a Notice of Intent to Sue (A.

53-57, 65, 69).[1] In fact, he informed Shell that Mrs. Dartt had not filed any Notice of Intent to Sue (A. 50).

Although the Labor Department investigator testified that he made an initial attempt to see if the complaint could be resolved, and described this attempt as "conciliation" (A. 55), he did not describe what he had done nor did he explain whether this pre-investigative settlement attempt was comparable to his later conciliation efforts after he received the Section 626(d) notice from Mrs. Dartt. No inquiry was made in the District Court proceedings as to the extent of the initial settlement attempt, because Mrs. Dartt did not premise her claim upon that ground. Instead, she claimed that her mistaken reliance upon the Department of Labor to preserve her rights, coupled with early notice to Shell of her claim, constituted sufficient equitable grounds to toll Section 626(d). (A. 51, 52; Tr. 10, 73, 81, 84, 131).

On appeal, the Department of Labor appeared as *amicus curiae*, and sought to file a brief, containing an Affidavit of Warren Landis, in support of its argument that the conciliation requirements of Section 626(d) had been fulfilled by the initial settlement attempt made by Mr. Speer (A. 1; 76-80). Shell moved to strike that brief, on the grounds that it was untimely filed (A. 1). The Court of

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[1] References to the joint Appendix are designated as (A. (page)). References to the original transcript are designated as (Tr. (page)). References to the Tenth Circuit Reply Brief of Shell to the *Amicus* Brief by the Labor Department are designated as (Shell Resp. Bf. (page)).

Appeals denied that motion, but gave Shell leave to file a response (A. 1). Shell did so, again objecting to the Landis Affidavit on the grounds that it was untimely presented and contained hearsay, and offering in rebuttal the Affidavit of Ken Jacobs as to the facts surrounding the initial settlement attempt (Shell Resp. Bf., p. 2, 3).

The Jacobs Affidavit revealed that the initial "conciliation" consisted of a simple inquiry by Mr. Speer as to whether Shell was interested in exploring possible settlement of the Dartt complaint or whether Shell wished to respond to the complaint (A. 81, 82). Mr. Jacobs stated that he was not informed by Mr. Speer that any "conciliation" was occurring, and Mr. Jacobs believed that an ordinary investigation was in progress (A. 81).

Shell responded to the Speer inquiry by stating that it preferred to postpone any settlement discussions until after a full investigation, because it felt that such an investigation would vindicate its position that Mrs. Dartt had been properly terminated (A. 77, 82). There were no further contacts between Shell and the Labor Department for some three months, during which time Shell was preparing voluminous compilations for Mr. Speer concerning its personnel actions (A. 77, 82). The next contact was instituted by Shell, and consisted of a telephone conversation by Mr. Jacobs to Mr. Speer to inform Mr. Speer of the status of the compilations (A. 82).

After Mr. Speer received the Notice of Intent to Sue from Mrs. Dartt, he advised Shell of the Notice and of his

conciliation responsibilities under Section 626(d), and set up a conciliation meeting. (A. 78, 82). Mr. Jacobs described this meeting as follows:

> [M]r. Speer advised me that he was no longer acting as an investigator with respect to the charge, but was there solely as a "mediator." He stated that it made no difference to him as to who was right in the dispute, and that anything the parties could agree on was fine with him. (A. 82)

Mr. Jacobs compared the difference between the first "conciliation" meeting and the second meeting, as follows:

> In the October meeting, Speer had stated that any settlement of the case would need to be acceptable to the Department of Labor and to Ms. Dartt. In the meeting mentioned above, he appeared to be disinterested in how the case was settled. Furthermore, in the October, 1973 meeting, Mr. Speer merely offered Shell the opportunity to explore settlement of the charge, whereas, in the last meeting, Speer appeared to be actively interested in bringing the parties together without any control by Speer over the terms of the settlement. (A. 82, 83)

According to the Jacobs Affidavit, Mr. Speer continued to play an active role in the pursuit of possible settlement after this meeting. He ascertained the initial demands by Mrs. Dartt and communicated them to Shell. (A. 82, 83). He encouraged Shell to consider the proposal by Mrs. Dartt, and offered his assistance in presenting any Shell counter-proposal to Mrs. Dartt (A. 83).

Neither Mrs. Dartt nor the Labor Department objected to the introduction of the Jacobs Affidavit, nor did

either present any evidence in rebuttal of this supplementary evidence as to what had actually taken place during the first and second conciliation efforts mentioned by Mr. Speer. The Court of Appeals did not strike either the Landis or the Jacobs Affidavit. However, in adopting the new argument by the Department of Labor that the first conciliation attempt was adequate to satisfy the purposes of Section 626(d), the Court of Appeals neither discussed the undisputed contrary evidence proffered in the Jacobs Affidavit, nor did it remand for a further hearing as to the scope of the first conciliation attempt.

III. ARGUMENT AND AUTHORITIES

A.

This Court Should Reject The New Issue Raised By Mrs. Dartt As To The Effective Date Of Her Termination.

In her brief to this Court, Mrs. Dartt raises, for the first time, the argument that the 180-day period in Section 626(d) did not begin to run until December 31, 1973 (Resp. Bf. 17, 18). That date is the date through which Mrs. Dartt calculated that her lump sum severance payment (paid at her termination on July 31, 1973) would have compensated her (A. 48).

This issue is not properly before this Court, because Mrs. Dartt did not raise it before the district court, the Court of Appeals, or before this Court through a cross-petition for certiorari. Throughout the proceedings before the courts below, all parties acknowledged that the alleged

discrimination against Mrs. Dartt occurred on the date of her termination on July 31, 1973 (A. 4, 8, 11, 27, 40, 43-45, 76, 77). In fact, Mrs. Dartt testified that she believed that the 180-day period ran from the July 31, 1973 termination date, and that she believed that her Notice of Intent to Sue was out of time (A. 43-45).

By untimely seeking to present this issue, Mrs. Dartt has violated Rule 40 of the Supreme Court Rules. That Rule expressly prohibits a party from raising new questions in a brief on the merits. It is well-established that this Court will refuse to consider any additional attack upon a judgment below, where the question was neither raised nor litigated before the lower courts. *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, at 191 (1937); *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, at 330 (1967); *J. I. Case Co. v. Borak*, 377 U.S. 426, at 428-429 (1964); *De Sylva v. Ballentine*, 351 U.S. 570, at 582 (1956); *McCullough v. Kammerer Corp.*, 323 U.S. 327, at 380 (1945); *Helvering v. Minnesota Tea Co.*, 296 U.S. 378 (1935); *Electrical Workers v. Robbins & Myers, Inc.*, ___ U.S. ___, 97 S. Ct. 441, at 446 (1976).

In the *Robbins & Myers* case, this Court expressly refused to accept a similar belated contention by a Title VII plaintiff as to the effective date of her termination, noting that none of the parties had previously raised such an issue and it was now too late to do so. Mrs. Dartt had proffered no reason for departure from these well-

settled principles, and this Court must find that the presentation of this new issue is foreclosed.

Moreover, assuming *arguendo* that the issue could be raised, it is clear that the 180-day period commenced to run on July 31, 1973, when Mrs. Dartt ceased performing any more work for Shell and was terminated. There is no argument that here, like in *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975), Mrs. Dartt was confused as to the effective date of her termination because her last day of work and her last pay period did not coincide. Instead, Mrs. Dartt received her last paycheck and her notice of her termination on the same day, and testified that she considered July 31, 1973 to be her termination date.

Thus, Mrs. Dartt is in the identical position to the plaintiffs in *Electrical Workers v. Robbins & Myers, Inc.*, *supra*, and in *United Air Lines, Inc. v. Evans*, ___ U.S. ___, 97 S. Ct. 1885. The time limitation started to run on July 31, 1973, and expired 180 days thereafter, at which time the termination of Mrs. Dartt became "a past event which has no present legal significance." (97 S. Ct. at 1890).[2]

B.

The Mere Receipt And Processing By The Labor Department Of The Dartt Complaint Did Not Satisfy The Requirements Of Section 626(d)

[2] See also, *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 1234 (8th Cir. 1975); *Doski v. M. Goldseker Co.*, _____ F. Supp. _____, 10 EPD ¶ 10,582 (D.C. Md. 1975).

In her brief, Mrs. Dartt argues that this Court should excuse her failure to timely file a Notice of Intent to Sue. This argument is premised on the exclusive grounds that her presentation of her oral complaint, and the subsequent processing of that complaint by the Labor Department, brings this action within the tolling principles enunciated by this Court in *Burnett v. New York Central R.R. Co.*, 380 U.S. 424 (1965).[3]

According to Mrs. Dartt, this action falls within the *Burnett* tolling principles for two reasons. First, the fundamental notice and conciliation purposes of Section 626(d) were allegedly fulfilled when Shell and the Labor Department received early notice of her claim and when Shell was asked by the Labor Department if it wished to engage in settlement discussions. Secondly, because the fundamental purposes of Section 626(d) were allegedly fulfilled, this

[3] Mrs. Dartt did not proffer any argument nor did she seek to otherwise refute the contentions by Shell that the facts in this case did not warrant any tolling of the Section 626(d) time limitation on the recognized equitable grounds for tolling statutes of limitations due to misconduct by the defendant; legal disability of the plaintiff; or inability to take the required action due to operation of law. Mrs. Dartt does not appear to argue that she was excusably ignorant of the requirement, apparently accepting the holding by the Court of Appeals that the Department of Labor had no statutory duty to advise her of the requirement (A. 35). Likewise, she does not argue that she had insufficient knowledge of the A.D.E.A. to put her on inquiry as to Section 626(d). Instead, her argument is based solely upon the alleged lack of prejudice to Shell by the untimely filing of her Notice of Intent to Sue.

Court must give a liberal interpretation to the otherwise clear language of Section 626(d) in order to effectuate the humane and remedial purposes of the A.D.E.A.

As will be seen below, both the facts and the legislative history of Section 626 demonstrate conclusively that neither the notice nor conciliation purposes of Section 626(d) were fulfilled by the registering of the oral complaint or the initial settlement inquiry. As will also be shown, the adoption of the theory advanced by Mrs. Dartt would significantly disrupt the orderly administration of the A.D.E.A. and frustrate the Congressional purposes in enacting Section 626(d).

1. The Purposes of Section 626(d) Were Not Satisfied by Labor Department Processing of the Dartt Complaint.

Shell addressed at length in its principal brief the reasons why an oral complaint does not satisfy the notice requirements of Section 626(d), because such a complaint fails to notify either the employer or the Labor Department of the intention by the complainant to bring a private action. Shell argued that, without this triggering event, both the Department of Labor and the employer are deprived of the impetus to engage in the type of exhaustive conciliation which Congress deemed to be essential to effective enforcement of the A.D.E.A. As will be further discussed below, the facts in this case demonstrate that the oral complaint by Mrs. Dartt failed to trigger the type of

exhaustive conciliation contemplated by Section 626(d).

Section 626(d) provides that, upon receipt of a Notice of Intent to Sue, the Department of Labor must promptly notify the employer of this fact, and must promptly "seek to eliminate any alleged unlawful practice by informal methods of conference, conciliation and persuasion." This conciliation responsibility of the Department is virtually identical to the requirement of Section 626(b), which requires similar conciliation efforts before the Department institutes any suit of its own under the A.D.E.A.

The legislative history of Section 626 (which was Section 7 of the Act) reveals that Congress intended that the conciliation responsibilities of the Labor Department be quite stringent, and that the Labor Department exert every effort to prevent the filing of a lawsuit through its mediation efforts. As Representative Dent stated in his discussion of this provision of H.R. 13054:

> It is intended that the responsibility for enforcement, vested in the Secretary by section 7, be initially and exhaustively directed through informal methods of conciliation, conference and persuasion, and formal methods applied only in the ultimate sense.
>
> * * *
>
> In summary, section 7 of this bill:
>
> * * *
>
> Second. Directs the Secretary to attempt to secure voluntary compliance through conciliation, and requires 60 days' notice to the Secretary by persons intending to file civil actions to provide time for in-

formal methods to bring about compliance with the act.[4]

Although no reported cases have been found as to the extent of the conciliation responsibilities of the Labor Department under Section 626(d), the similarity of the language of Section 626(b) and the above-cited legislative history yield support for the argument that Sections 626(b) and (d) place virtually identical conciliation responsibilities upon the Labor Department. The principal case interpreting the duties of the Labor Department under Section 626(b) is *Brennan v. Ace Hardware Corporation*, 495 F.2d 368 (8th Cir. 1974).

In *Ace Hardware*, the Labor Department received oral complaints from two applicants concerning age discrimination. The Labor Department investigator met with the employer on two occasions to investigate the complaint, and thereafter telephoned the employer to notify it that the complaints appeared to have merit. The employer was apparently requested to settle the matter by hiring one of the complainants, but refused to do so, and the conversation ended. The employer was thereafter sued by the Department of Labor with respect to the complaints, but the action was dismissed for failure of the Department to engage in the type of exhaustive conciliation required by Section 626(b).

In affirming this dismissal, the Eighth Circuit found

[4] 113 Cong. Rec. 34748. See also identical language in H.R. Rep. No. 805, 90th Cong., 1st Sess. p. 5 (1967) and virtually identical language in S. Rep. No. 723, 90th Cong., 1st Sess. p. 5 (1967).

that the Department of Labor is required to employ "strong, affirmative attempts" to achieve compliance with the A.D.E.A. (495 F.2d at 374). This included informing the employer of the remedies available under the A.D.E.A; a warning that suit might be brought if no settlement is reached; notice to the employer of the demands which the plaintiff would make in such a suit; and notice to the employer that it could respond to these demands (495 F.2d at 375).

The facts in this case demonstrate that nothing at all comparable to these conciliation functions was performed by the Department of Labor during its initial pre-investigative settlement inquiry. Thus, Shell was not advised that any suit against it was contemplated by Mrs. Dartt, and, of course, Shell was not advised as to what demands Mrs. Dartt anticipated presenting in any such suit. There is no evidence that Shell was advised of the remedies available to a private plaintiff under the A.D.E.A.,[5] nor was Shell afforded a meaningful opportunity to make a counteroffer to Mrs. Dartt in light of this information.

Instead, both Shell and the Labor Department were led to believe that Mrs. Dartt did not intend to maintain a private action, as is demonstrated by the fact that the Labor Department informed Shell that Mrs. Dartt had not filed a Notice of Intent to Sue. Shell was further led to believe that no litigation against it was presently being

[5] i.e., reinstatement, backpay, liquidated damages, injunctive relief, and attorney fees.

contemplated, because the Department had not made any final determination that there was merit to the Dartt complaint. (A. 67) Likewise, Shell was led to believe that it could freely suspend any settlement discussions until after it had presented its side of the story in the investigation and the Department had reached a conclusion on the merits of the complaint.

As the preliminary processing of the Dartt complaint demonstrates, the Labor Department did not believe that it was under any stringent time limits in seeking resolution of the complaint, nor did the Department engage in exhaustive conciliation of the complaint. Rather, the Department did not make a single inquiry as to the interest of Shell in pursuing settlement during the 60-day period following its receipt of the oral complaint (A. 77). When the Department finally inquired as to Shell's interest in settlement some 80 days after the Dartt complaint was registered, it abandoned any further "conciliation" efforts when Shell advised the Department that it preferred to have an investigation before discussing settlement. (A. 77) To argue that this single, cursory inquiry constituted "strong affirmative attempts" to conciliate the Dartt complaint is nonsense.

It is apparent that the oral complaint by Mrs. Dartt wholly failed to trigger the type of exhaustive conciliation contemplated by Section 626(d).[6] Thus, because the oral

[6] Shell believes that the undisputed facts in the record adequately establish that the initial settlement inquiry failed to meet the conciliation standards of Section 626(d). However, assuming *arguendo* that

(Continued next page)

complaint failed to convey the requisite notice to activate the exhaustive conciliation required by Section 626(d), the *Burnett* tolling principle is inapplicable. That principle allows tolling of a statute of limitations only where alternative actions by a plaintiff fulfill the basic purposes of the statute. Such clearly did not take place here, even assuming *arguendo* that the time limitation of Section 626(d) is analogous to a statute of limitations and subject to the same tolling principles.

2. Allowance of Tolling Would Unduly Complicate Administration of the A.D.E.A.

As was previously discussed, Congress established the 180-day limitation period for filing a Notice of Intent to Sue in order to provide employers and the Department of Labor with speedy notice of possible private litigation. Such notice is essential to effective conciliation, both because the threat of impending litigation provides employers with significant added impetus to settle the claim while it is still small, and because the statute charges the Department of Labor with making immediate, concerted efforts to bring the parties together. To allow tolling of the time

(Footnote Continued)

there was insufficient evidence adduced on that issue and such issue has relevance to a final determination of this action, this Court may properly order this action remanded for further hearing. See, e.g., *Helvering v. Gowran*, 302 U.S. 238, at 246-247 (1937), wherein this Court ordered a remand where the case was decided on a different theory than that litigated below. See also, *Malat v. Riddell*, 383 U.S. 569, at 572 (1966); *Foster v. Dravo Corp.*, 420 U.S. 92 (1975).

for meeting the requirement would negate the principal purposes for the requirement.

This Court must not overlook the fact that the rule of law which it adopts in this case will be applied to all employers, large and small. The A.D.E.A. covers all employers with 20 or more employees. It must be remembered that a business with only twenty employees ordinarily has a limited budget for litigation expenses, and may ill afford the impact of substantial sums for backpay, liquidated damages and attorney fees for the opposing side. If given an early notice of an impending lawsuit and an explanation of the consequences if such litigation is successful, such small businesses (which make up a significant sector of American business) may seriously consider conciliation as a welcome alternative to suit.

When notice of an impending suit is not given within 180 days of the alleged violation, these small businesses will suffer significant harm. Backpay (for which the small employer will receive no productive work) may have risen to a large enough amount that the employer has no alternative but to litigate the matter. On the other hand, where an early notice of suit is given, and backpay is still small, the small business may well find that the anticipated costs of litigation so far exceed the price of settlement that conciliation is the best course.

The inherent weakness in the tolling allowed by the Court of Appeals for oral complaints is that it will promote

endless litigation as to when a complainant must register an oral complaint; what actions the Labor Department must take on the complaint; how soon a Section 626(d) notice must be filed after the oral complaint is registered; and so forth *ad infinitum*. For example, another complainant could go to an equally busy Labor Department office some 160 days after his discharge, and be treated in the same manner as Mrs. Dartt. In such a case, that complainant might not learn of the Notice of Intent to Sue requirement until a year after his discharge. Then, if the 180-day period was allowed to be indefinitely tolled by the oral complaint, this complainant could conceivably wait another year or more before finally filing a Notice of Intent to Sue.

Moreover, it might well occur that the particular Labor Department office might take an even longer time to notify the complainant of the Notice requirement. Thus, using the above example, it is not inconceivable that the Labor Department might never notify the complainant of the Notice requirement, because the 180-day period would have run before the Department started serious processing of the charge and notification would seem unnecessary. Would this failure to inform the complainant of the requirement act to preserve the private right of action indefinitely? Furthermore, what effect would this tolling have on the Section 255 statute of limitations?

If the 180-day time limit may be extended for oral complaints, what treatment should be accorded to other

plaintiffs who miss the time limit? If the employee takes his age discrimination claim directly to his employer within the 180-day period, either through grievance proceeding or through a simple complaint to higher company officials, arguments could also be made for application of tolling principles. What treatment should be accorded to persons who utilize these internal procedures, and file a Notice of Intent to Sue on the 181st day or the 190th day? These persons would have filed their Notice prior to the time that Mrs. Dartt filed her Notice in the instant action. Will this "slight delay" also be excusable? If it is not, then similarly-situated plaintiffs and defendants will be subject to wholly different time limits for filing the required Notice, based simply on whether a complaint was lodged with the Department of Labor.

If the registering of that oral complaint is the key to tolling, the next logical question is whether such tolling can be applied where the Labor Department took different actions with respect to the oral complaint than were taken with respect to Mrs. Dartt's complaint. What if the complaint is registered on the 180th day, but the Labor Department is so busy that the employer is not notified of the complaint until six months after the complaint is registered? What if the Labor Department receives a complaint on the 160th day and notifies the employer promptly, but never inquires as to whether the employer is interested in settlement? Will tolling be dependent on settlement overtures, and, if so, how extensive must those overtures be?

If the complaint is investigated and found lacking in merit, are settlement overtures necessary?

These questions are by no means frivolous. Many of them have already arisen in connection with litigation on the interpretation of Section 626(d). The list of questions is not at all exhaustive, but it serves to point out the problems which the courts will face if forced to make a case-by-case determination as to whether the particular facts would warrant equitable tolling. Instead of an easily-applied 180-day time period, the federal courts would be faced, in essence, with recurring questions of laches.

Shell submits that the strong public policy in favor of speedy resolution of A.D.E.A. complaints will be hindered, rather than furthered, by the application of the doctrine of tolling to the 180-day requirement. Employers, complainants and the Labor Department will be hopelessly confused as to the circumstances under which a private right of action is preserved.

There is nothing inherently unfair in strictly applying the 180-day limitation. Complainants have an ample period of time to discover what is necessary to preserve their rights to maintain a private action and to file a Notice of Intent to Sue with the Department of Labor.[7] Moreover, as A.D.E.A. complainants may resort to administrative relief through the Labor Department even after the 180-

[7] Notably, complainants have 180 days to file charges with E.E.O.C. under Title VII, and apparently meet this requirement with little difficulty.

day period has elapsed, they suffer less harm by a strict application of the 180-day time limits than do Title VII complainants, who are completely barred from relief where timely compliance with the Title VII charging requirement is not met.

A strict application of the time limit will also insure that employers receive prompt notice of an impending lawsuit, and will afford such employers the requisite certainty as to potential liabilities if the claim is not settled, thereby promoting settlement. Likewise, the Department of Labor will have definite knowledge of the claims to which it must devote speedy and vigorous conciliation efforts.

Mrs. Dartt argues that enforcement of the express terms of Section 626(d) is inappropriate, because too many A.D.E.A. actions are being dismissed because of lack of timely compliance with that Section. This argument is clearly addressed to the wrong branch of government. In truth, it begs the question, because the necessary and expected result of a short time limitation is that the number of private actions will be circumscribed. That the statistics seem to bear out this expected result is not surprising, and Congress remains free to alter or abolish Section 626(d) if it finds its operation to be overly harsh.[8]

In summary, this Court must refuse to allow tolling of the 180-day period for persons who register oral complaints with the Labor Department, or who take other

[8] Indeed, as will be seen, a Bili has been passed by the Senate to eliminate the 180-day requirement.

alternative actions which do not fulfill the Notice of Intent to Sue requirement.[9] No legitimate public policy arguments exist for tolling the requirement, because strict application of the time limit gives full effect to the language of the statute; prevents possible prejudice to the employer and Labor Department due to the untimely notice; and leaves the complainant with an adequate remedy expressly approved by Congress.

3. Application of a Tolling Principle to Section 626(d) Would Infringe Upon Congressional Prerogatives.

Recent actions by the Congress with respect to proposed amendments to the A.D.E.A. support the argument by Shell that any modification of Section 626(d) should properly be made by Congress. These actions also support the argument by Shell that Congress has not yet provided that A.D.E.A. time limitations may be tolled during the period in which the Labor Department is processing a complaint.

On March 24, 1977, Secretary of Labor Marshall testified before a House Subcommittee in favor of two procedural amendments to the A.D.E.A., as well as other

[9] See footnote 30, principal Brief of Shell, together with the following recently decided cases holding that Section 626(d) is a jurisdictional prerequisite to suit: *Charlier v. S. C. Johnson & Son, Inc.*, _____, F.2d _____, 15 FEP Cases 421 (5th Cir. 1977); *Platt v. Burroughs Corp.*, 424 F. Supp. 1329 (E.D. Pa. 1976); *Black v. Hunter Packing Co.*, 427 F. Supp. 152 (E.D. Ill. 1977); *Montgomery v. Obear-Nester Glass Co.*, ____ F. Supp. _____, 15 FEP Cases 614 (E.D. Ill. 1977); *Davis v. RJR Foods, Inc.*, 420 F. Supp. 930, (S.D. N.Y. 1976).

matters not pertinent here. The first amendment sought by Secretary Marshall was a provision which allowed tolling of the A.D.E.A. statute of limitations period during conciliation efforts by the Department of Labor. Mr. Marshall stated that such an amendment was needed, because:

> The difficulty we face, however, is that the conciliation process does not toll the operation of the statute of limitations as it does in Title VII of the Civil Rights Act.[10]

The second amendment sought by Secretary Marshall was deletion of the Notice of Intent to Sue requirement. Secretary Marshall noted that a number of courts had held this requirement to be a jurisdictional prerequisite to suit, and stated:

> Although this issue is now before the Supreme Court, it is our view that an amendment deleting the notice requirement would materially advance the purposes of the ADEA . . . .[11]

Subsequent to the testimony by Secretary of Labor Marshall, the full House took up consideration of H.R. 5383, which contained certain amendments to the A.D.E.A. Significantly, this Bill was reported to the full House by the Committee on Education and Labor without either of

[10] See Appendix A, hereto, containing the pertinent provisions of his remarks, at p. 30. Assistant Secretary of Labor Elisburg gave identical testimony to a Senate Subcommittee on July 26, 1977. See Appendix B, hereto, at p. 31.

[11] Appendix A, at p. 30, 31. See identical remarks by Assistant Secretary Elisburg, Appendix B, at p. 32.

the amendments proposed by Secretary Marshall.[12] Section 7(d) was specifically set forth in the House Report, and left unchanged.[13] In the debate before the full House, no effort was made to present the amendments proposed by Secretary Marshall, and the Bill was passed leaving Section 7(d) intact.[14]

Subsequent to the passage of H.R. 5383, that Bill was sent to the Senate for its consideration. On October 11, 1977, the Senate Human Resources Committee reported out H.R. 5383 with a number of amendments.[15] These amendments included modified versions of the two amendments sought by Secretary Marshall and Assistant Secretary Elisburg.

The Senate Committee version of H.R. 5383 altered the Notice of Intent to Sue requirement by deleting the 180-day time limit.[16] It is apparent that the Committee felt that it was making an important, substantive change, because the Report speaks in terms of the Notice of Intent to Sue requirement being abolished, stating:

> Section 7(d) of the act requires that an individual must give the Department of labor notice of intent to file suit within 180 days after the alleged unlawful practice occurs. . . . Subsection (a) of Section 4 eliminates . . . these requirements.

[12] H. Rep. No. 95-527, 95th Cong., 1st Sess. p. 16-25 (June 25, 1977).

[13] H. Rep. No. 95-527, *supra*, at p. 20.

[14] 123 Cong. Rec. H 9967-9985 (Sept. 23, 1977)

[15] S. Rep. No. 95-493, 95th Cong., 1st Sess. (October 12, 1977).

[16] S. Rep. No. 95-493, *supra*, at p. 25. See Appendix C for the text of such modification.

Subsection (b) provides that the elimination of the notice of intent to sue requirement shall take effect with respect to civil actions brought after the date of enactment.[17]

With respect to the tolling amendment sought by Secretary Marshall, the Senate Committee version of H.R. 5383 adopted a provision which allowed tolling of the Section 255 statute of limitations only during the time that the Department of Labor is engaged in conciliation pursuant to Section 626(b).[18] Notaby, there was no provision for comparable tolling while the Department of Labor was engaged in conciliation pursuant to its receipt of a Section 626(d) Notice of Intent to Sue.

The full Senate passed the Senate Committee version of H.R. 5383 on October 19, 1977.[19] Before passage of the amendment deleting the 180-day requirement, Senator Church (who sponsored the amendment) stated that the effect of the deletion would be "to extend from 180 days to 22 months the notice of intent to sue requirement for em-

[17] S. Rep. No. 95-493, *supra*, at p. 20, 21. See also page 12, wherein the Report states that the Committee is "removing the 180-day notice requirement entirely." However, the 180-day limit was retained for suits by Federal employees. S. Rep. No. 95-493, at p. 30.

[18] S. Rep. No. 95-493, *supra*, at p. 25. See also pp. 13 and 21 of that Report. The text of the proposed amendments is set forth in Appendix D.

[19] 123 Cong. Rec. S17272-17304 (1977). Some minor changes were made which, with one exception later discussed, were not pertinent here. See Appendix E for the text of Sections 7(d) and (e) (29 U.S.C. S626(d), (e)), as passed by the Senate.

ployees."[20] Senator Church stated that the reason for this change was to allow employees more time to learn of the requirement and to decide whether to file suit.[21]

The Senate also passed the tolling provision, allowing tolling of the statute of limitations during conciliation efforts by the Labor Department pursuant to Section 626(b), but limited that tolling to a maximum of two years.[22] The stated reason for circumscribing this tolling was that "unlimited tolling . . . during which time the employer continues to be liable for additional backpay damages" would constitute "an undue burden on the business community."[23] The Senate and House Bills are now scheduled to go to a Joint House-Senate conference Committee for resolution.[24]

From the above legislative developments, it is apparent that the Senate considered the 180-day time limit for filing a Notice of Intent to Sue to be an integral part of the requirement itself.[25] In deleting the 180-day period,

[20] 123 Cong. Rec. S17278 (1977). Senator Church apparently used the 22 month example because a 2 year (i.e., 24 month) statute of limitations applies to most A.D.E.A. actions. The sixty-day notice requirement would not toll this limitation period, which would result in notice having to be filed about two months prior to the running of the statute of limitations.

[21] 123 Cong. Rec. S17278 (1977).

[22] 123 Cong. Rec. S17295, 17296.

[23] 123 Cong. Rec. S17296.

[24] 123 Cong. Rec. S17304

[25] But see remarks by Senator Williams, 123 Cong. Rec. S17275 (1977).

the Senate Report speaks in terms of having eliminated the Notice of Intent to Sue requirement altogether, even though the Senate Bill would still require a private party to notify the Department of Labor before bringing suit. Moreover, the House continued to adhere to the present Section 626(d) requirement, in the face of overwhelming precedent construing timely compliance therewith as being a "jurisdictional prerequisite," to suit. These two factors militate strongly in favor of the conclusion that the 180-day limit of Section 626(d) is an integral part of the right to maintain any suit whatsoever, which must be strictly enforced.

This conclusion is further buttressed by the actions taken by the Senate with respect to tolling. As was discussed above, the Senate clearly believed that it was plowing new ground when it enacted a limited provision for tolling of the Section 255 statute of limitations only during conciliation activities by the Labor Department pursuant to Section 626(b). Thus, it may be concluded that the Senate believed that no tolling of A.D.E.A. time limits is permitted under the existing statute.

This provision of the Senate Bill becomes important if one accepts the argument by Mrs. Dartt that the 180-day requirement is simply another, shorter statute of limitations. Both the Secretary and Assistant Secretary of Labor testified that the A.D.E.A. statute of limitations is not tolled, under existing law, by the processing of a complaint by the Department. Therefore, if the 180-day time

limit is construed in the same manner as the Section 255 statute of limitations, it is clear that Mrs. Dartt would not be entitled to any tolling of the 180-day period by virtue of the actions by the Department on her behalf.

In summary, the above legislative developments reinforce the argument by Shell that Congress intended to retain the exclusive prerogative of deciding what, if any, modifications should be made in Section 626(d). Until Congress finally decides to either alter or abolish the provisions of Section 626(d), it is incumbent upon this Court to enforce that statute according to its express terms. Because the decision of the Court of Appeals failed to do so, this Court must reverse.

C.

Contrary To The Assertion By Mrs. Dartt, The District Court Considered Equitable Factors In Reaching Its Decision.

In her brief, Mrs. Dartt argues that the District Court strictly construed Section 626(d) to be a jurisdictional prerequisite, which could not be modified or tolled on equitable grounds (Dartt Bf. p. 3, 8, 9). However, this is clearly not the case.

As the opinion of the District Court reveals, that Court considered the 180-day time limit contained in Section 626(d) to be analogous to a statute of limitations, and noted that "the same principles should apply" (A. 19). The District Court made an exhaustive analysis of the

equitable arguments advanced by Mrs. Dartt, and concluded Mrs. Dartt "did not take any action which would justify the tolling of a statute of limitations in a parallel situation." (A. 23).

On appeal, Shell properly advanced in support of the judgment its argument (which was rejected by the lower court) that timely compliance with Section 626(d) was a mandatory jurisdictional prerequisite which could not be modified on equitable grounds. See, e.g., *Lagnes v. Green*, 282 U.S. 531 (1931). Perhaps due to the vigorous presentation by Shell of this argument, the Court of Appeals misconstrued the decision by the District Court as having held that failure to timely comply with Section 626(d) was "an absolute bar" to a private A.D.E.A. action (A. 29, 30). The Court of Appeals then analyzed the equitable arguments advanced by Mrs. Dartt, and construed the relative equities differently (A. 33-36).

As was noted in the principal brief of Shell, this preemption of the discretionary equitable powers of the District Court, vested in that Court by virtue of Section 626(b), was clearly erroneous. The Court of Appeals did not hold that the District Court abused its discretion. Instead, the Court of Appeals, apparently believing that the District Court had failed to exercise its discretionary powers, improperly engaged in a *de novo* review of the record in order to determine the equities in the case.

It is clear that the Court of Appeals erred both in its apparent finding that the District Court had failed to

exercise its discretion and in engaging in a *de novo* review of the record. *Burns v. U.S.*, 287 U.S. 216 (1932); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969).[26] As a resut, its decision must be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals must be reversed, and this action ordered dismissed.

Respectfully submitted,

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[26] Mrs. Dartt did not respond to this argument by Shell, apparently because of her assertion that the District Court simply refused to exercise its discretion. However, assuming *arguendo* that the District Court did, in fact, fail to exercise its discretion, it is well-established that the proper course which should have been followed by the Court of Appeals was to lay down the proper standards for exercise of that discretion and remand to the District Court for reconsideration of its holding in light of these new standards. See *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

APPENDIX A

Extract of Remarks by Secretary of Labor Marshall to House Labor Subcommittee On Labor Standards, March 24, 1977. (Taken from BNA Daily Labor Report, Volume 58, p. E-2 (March 24, 1977))

> Although ADEA is a separate statute, it incorporates the enforcement machinery of the Fair Labor Standards Act. In addition to this machinery, the ADEA provides that the Department will attempt to achieve voluntary compliance (through the conciliation process) before instituting suit. Such suits are subject to the same statute of limitations applicable to suits brought under the Fair Labor Standards Act. The difficulty we face, however, is that the conciliation process does not toll the operation of the statute of limitations as it does in Title VII of the Civil Rights Act. The result is that employers have no incentive to engage in prompt or serious conciliation. Every day in conciliation means a diminution in any relief which the employer may ultimately be required to provide. I think it clear that the conciliation process would be greatly enhanced if the Act were amended to provide, as you did in Title VII, for the tolling of the statute of limitation during the conciliation process.
>
> A second issue concerns the notice of intent to sue which an employee must file with the Secretary prior to instituting court action. The ADEA, although providing for a two and three-year statute of limitations, contemplates that this notice will be filed within 180 days of the asserted violation. A number of courts have construed this notice requirement as a jurisdictional prerequisite to suit. This interpretation has frustrated achievement of the purposes of the ADEA in a significant number of cases. Although this issue is now before the Supreme Court, it is our view that

> an amendment deleting the notice requirement would materially advance the purposes of the ADEA and would refocus litigation from procedural matters to the substantive merits of each case.

APPENDIX B

Extract of Remarks by Assistant Secretary of Labor Elisburg to Senate Human Resources Subcommittee On Labor, July 26, 1977. (Taken from BNA Daily Labor Report, Volume 144, p. E-2 (July 26, 1977)).

> Before concluding, I would like to suggest consideration of two further changes in the ADEA. Secretary Marshall made these recommendations when he testified on the minimum wage before the House Subcommittee on Labor Standards last March.
>
> Although ADEA is a separate statute, it incorporates the enforcement machinery of the Fair Labor Standards Act. In addition to this machinery, the ADEA provides that the Department will attempt to achieve voluntary compliance (through the conciliation process) before instituting suit. Such suits are subject to the same statute of limitations applicable to suits brought under the Fair Labor Standards Act. The difficulty we face, however, is that the conciliation process does not toll the operation of the statute of limitations as it does in title VII of the Civil Rights Act. The result is that employers have no incentive to engage in prompt or serious conciliation. Every day in conciliation means a diminution in any relief which the employer may ultimately be required to provide. I think it clear that the conciliation process would be greatly enhanced if the Act were amended to provide, as you did in title VII, for the tolling of the statute of limitations during the conciliation process.

A second issue arises because of procedural time limits imposed in private suits which are not imposed on suits brought by the Secretary. This problem concerns the filing of notice of intent to sue which an employee must file with the Secretary prior to instituting a private court action. The ADEA, although providing for a two- and three-year statute of limitations, contemplates that this notice will be filed within 180 days of the asserted violation. A number of courts have construed this notice requirement as a jurisdictional prerequisite to suit. This interpretation has frustrated achievement of the purposes of the ADEA in a significant number of cases. Although this issue is now before the Supreme Court, it is our view that an amendment deleting the notice requirement would materially advance the purposes of the ADEA and would refocus litigation from procedural matters to the substantive merits of each case.

APPENDIX C

Text of proposed modification to Section 7(d) of the A.D.E.A. (29 U.S.C. § 626(d), as reported out by Senate Human Resources Committee. As per Senate rules, language proposed to be deleted is bracketed, and new language is italicized.

> [(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed — (1) within one hundred and eighty days after the alleged unlawful practice occurred, or (2) in a case to which section 14(b) applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier. Upon receiving

> a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.]
>
> *(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.*

Apparently through inadvertent error, the Senate Report does not set forth the effective date of this proposed amendment, although it seems clear that the Committee intended to adopt Section 4(b) of the amendment introduced by Senator Williams (see pp. 16, 17, 21 of the Report), which provided that the new Section 7(d) *"shall take effect with respect to civil actions brought after the date of this Act."* See 123 Cong. Rec. S17272 (1977).

APPENDIX D

Text of proposed amendment of Section 7(e) of the A.D.E.A. (29 U.S.C. § 626(e)), as reported out by Senate Human Resources Committee. As per Senate rules, language proposed to be deleted is bracketed, and new language is italicized.

> [(e) Sections 6 and 10 of the Portal-to-Portal Act of 1947 shall apply to actions under this Act.]
>
> *(e) For the period during which the Secretary is attempting to effect voluntary compliance with requirements of this Act through informal methods of conciliation, conference and persuasion pursuant to*

subsection (b), the statute of limitations as provided in section 6 of the Portal-to-Portal Act of 1947 shall be tolled.

Apparently through inadvertent error, the Senate Report does not set forth the effective date of this proposed amendment. However, it seems clear that the Committee intended to adopt Section 5(b) of the amendment proposed by Senator Williams (see p. 16, 17, 21 of the Report), which provided that the above amendment "*will take effect with respect to conciliations commenced after the date of enactment of this Act.*" See 123 Cong. Rec. S17272.

Prior to passage by the Senate, a technical amendment was adopted reinstating former Section (e), redesignating it as subsection (1), and renumbering the amendment as subsection (2). See 123 Cong. Rec. S17278.

APPENDIX E

Text of amendments to Sections 7(d) and 7(e), as passed by the Senate. (123 Cong. Rec. S17272-17304.)

SEC. 4. (a) Section 7(d) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(d)) is amended to read as follows:

"(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion."

(b) The amendment made by subsection (a) of this section shall take effect with respect to civil actions brought after the date of enactment of this Act.

SEC. 5 (a) Section 7(e) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(e)), is amended by inserting (1) after the subsection designation and by adding at the end thereof the following:

(2) For the period during which the Secretary is attempting to effect voluntary compliance with requirements of this Act through conciliation, conference and persuasion pursuant to subsection (b), the statute of limitations as provided in section 6 of the Portal-to-Portal Act of 1947 shall be tolled, but in no event for a period in excess of two years.

(b) The amendment made by subsection (a) of this section will take effect with respect to conciliations commenced after the date of enactment of this Act.

MOTION FILED
MAY 9 1977

No. 76-678

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Supreme Court of the United States
OCTOBER TERM, 1976

SHELL OIL COMPANY,
Petitioner,
v.
ANNE M. DARTT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the Equal Employment Advisory Council (hereafter EEAC) moves this Court for leave to file the accompanying brief as *Amicus Curiae* in support of the position of the petitioner, Shell Oil Company, in this case. In support of this motion, EEAC shows as follows:

1. This motion for leave to file is necessary under Rule 42(3) because counsel for the respondent has advised that consent for the filing of this brief would not be granted. Counsel for the petitioner has given her written consent, which has been filed with the Clerk of the Court.

2. The questions presented for review in this case raise issues of substantial importance to the *Amicus Curiae*. The issues herein involve the interpretation of Section 626(d) of the Age Discrimination in Employment Act of 1967, 29 USC 621 *et seq.* (ADEA or the Act), which provides that no private civil action may be commenced under the ADEA until the person alleging age discrimination has given the Secretary of Labor not less than 60 days' notice of an intent to file such a suit. Section 626(d) also states that such notice shall be filed within 180 days after the alleged unlawful practice occurred. Briefly summarized, the Court is asked to decide whether this notice filing requirement is a jurisdictional prerequisite or rather, whether the notice requirement may be tolled or suspended under circumstances which would toll an ordinary statute of limitations.

3. The Equal Employment Advisory Council is a voluntary, non-profit association, organized as a corporation under the laws of the District of Columbia. Its membership includes a broad spectrum of employers from throughout the United States, including both individual employers and trade and industry associations. The principal goal of EEAC is to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Substantially all of EEAC's members or their constituents, are employers subject to the provisions of the ADEA, as well as other equal employment statutes and regulations. As such, they have a direct interest in the issues presented for the Court's consideration in this case.

4. Because of this interest, the EEAC sought and was granted permission by this Court to file briefs as *Amicus Curiae in Electrical Workers, Local 790* v. *Robbins & Meyers, Inc.*, —— U.S. ——, 13 FEP Cases 1813 (1976), and *United Air Lines, Inc.* v. *Carolyn J. Evans* (Docket No. 76-333). Both cases involved the construction to be given the statute of limitations contained in Title VII of the Civil Rights Act of 1964 (42 USC 2000e, *et seq.*) Similarly, EEAC has filed *amicus curiae* briefs in other cases now pending before this Court. See *East Texas Motor Freight System, Inc.* v. *Rodriguez* (Docket No. 75-651); *T.I.M.E.-D.C., Inc.* v. *U.S.* (Docket No. 75-672); and *Trans World Airlines, Inc.* v. *Hardison* (Docket No. 75-1126).

5. The movant *Amicus*, and its members, have broad knowledge concerning the issues in this case. Because of this knowledge, the *Amicus* is uniquely situated to brief the Court on the practical as well as legal aspects of the issues presented here.

WHEREFORE, it is respectfully moved that the EEAC be granted leave to submit the accompanying brief as *Amicus Curiae* in this case.

Respectfully submitted,

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---

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

STATEMENT OF THE CASE

Plaintiff Dartt initiated this individual action under the Age Discrimination in Employment Act (hereinafter referred to as ADEA) in the district court on May 21, 1974, alleging that her discharge

by Shell Oil Company on July 31, 1973, was motivated by age discrimination. The district court dismissed the suit because Dartt had not filed a notice of intent to sue within 180 days after her discharge, as required by Section 7(d)(1) of ADEA.

On appeal, the Tenth Circuit rejected Dartt's contention that her oral complaint to the Department of Labor Wage and Hour Division was adequate to satisfy the requirement of filing a written notice of intent to sue,[1] but concluded that the specific statutory 180-day notice period should be treated as a statute of limitations rather than a mandatory jurisdictional prerequisite and could be extended indefinitely under the equitable doctrine of tolling. It then determined that the notice filed by Dartt's attorney 216 days after her discharge, and 36 days late under ADEA, was sufficient in this case. The relevant underlying facts are fully detailed in Shell Oil Company's brief to this Court and are adopted herein by the *Amicus Curiae*.

SUMMARY OF ARGUMENT

The conclusion reached by the district court in this case—that filing of a notice of intent to sue within the 180-day period specified in § 7(d)(1) is a jurisdictional prerequisite to a private suit under ADEA—is consistent in principle with this Court's recent decisions holding that the filing and notice provisions of employment discrimination laws may not be judicially altered or set aside, even briefly. See *Int'l Union of Electrical Workers, Local 790* v. *Robbins*

[1] The Wage and Hour Division informed the Company that Dartt had not filed a Notice of Intent to Sue.

& Myers, Inc., —— U.S. ——, 13 FEP Cases 1813 (1976); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 10 FEP Cases 817 (1975). Indeed, the court of appeals acknowledged that there was "ample authority" supporting the district court's holding. 539 F.2d at 1259, 13 FEP Cases at 13. Nevertheless, the court of appeals reached the opposite conclusion, reasoning that Congress did not intend the 180-day notice requirement to be an "absolute prerequisite" to private ADEA actions. The *Amicus* submits that the court of appeals' interpretation of the legislative intent is misguided and would, in fact, undermine the carefully designed Congressional scheme for implementing the ADEA.

As shown below, the 180-day limitation on giving of notice is an integral part of the Congressional plan whose strict statutory language emphasizes prompt, effective conciliation rather than private suits, as the favored means of resolving age discrimination complaints. The decision below is contrary to this Congressional intent, would encourage the litigation of stale claims, and fosters uncertainty with respect to the proper time for filing notice of intent to sue under the ADEA. The requirement that individuals file a notice of intent to sue within 180 days of the alleged discriminatory practice is a jurisdictional rule that is easily determined, capable of consistent administration and possessed of a high degree of certainty. Such a provision helps to achieve national uniformity and prevent vexatious litigation.

ARGUMENT

I. THE STATUTORY SCHEME AND CONGRESSIONAL INTENT MAKE CLEAR THAT THE EXPLICIT NOTICE REQUIREMENT OF SECTION 7(d)(1) OF THE ADEA IS JURISDICTIONAL AND MUST BE STRICTLY CONSTRUED.

A. The Language Used By Congress In The Act Is Concise, Unambiguous And Carefully Selected.

The statutory scheme of the ADEA, while conferring on individuals in Section 7(b) [29 USC 626 (b)] the specific right to sue for violations, also provides certain notice requirements as conditions precedent to bringing such civil actions. Thus, Section 7 (d) [29 USC 626(d)] expressly provides:

> (d) No civil action may be commenced by any individual under this section until the individual has given the Secretary [of Labor] not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred . . .[2]

Under the statute, the giving of such notice then invokes a corresponding duty upon the Secretary of Labor, to wit:

> . . . upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.

[2] The statute expands the 180-day period to 300 days under Section 7(d)(2) [29 USC 626(d)(2)] where a state agency exists that has authority to act over complaints involving age discrimination. Oklahoma does not have such an agency so this extended period is not here involved.

Thus, the basic framework of the Act mandates two initial conditions prior to bringing private suit. It requires an allegedly aggrieved individual to invoke certain notice-giving machinery within a fixed period of time to put any "prospective defendants" on notice through the filing of a notice of intent to sue with the Secretary of Labor and to afford the Labor Department an opportunity to try to resolve the matter by exhaustive pursuit of informal methods short of litigation [3] before a suit may be commenced. Each of these elements is the product of sound reason and confirms the existence of an overall integrated procedure under the Act. They relate solely to the steps required prior to the commencement of a private civil action and in no way relate to the period of time within which suit can be brought under the Act's separate statute of limitations.

This latter subject is specifically treated in ADEA Section 7(e) [29 USC 626(e)] which incorporates by reference the limitation on actions provision of Section 6 of the Portal to Portal Act.[4] Any doubts that Congress intended 626(e) to be a separate and distinct feature of the statutory scheme are dispelled by the heading of Section 6: "Statute of Limitations."

[3] *Brennan* v. *Ace Hardware Corp.*, 495 F.2d 368, 374, 7 FEP Cases 657, 661-662 (8th Cir. 1974).

[4] 29 USC 255. The section provides for either a two-year or a three-year limitation period, the latter in the case of willful violations.

Thus, once a prospective plaintiff has given the required notice of intent to sue within 180 days and the Secretary has been allowed the sixty-day conciliation period, the plaintiff may bring suit in the courts at any time thereafter within either the two (2) or three (3) year period as the case may be. Clearly, the purpose of the notice and conciliation requirement is to conclude the necessary steps leading to perfection of a right of action by an individual under the Act.

The Tenth Circuit has correctly interpreted Section 6 of the Portal to Portal Act as being no more than a "conventional procedural statute of limitations," observing, however, that "[t]he wording of Section 6 is noticeably different from that of other statutory time limitations which have been interpreted as establishing conditions precedent." *Hodgson* v. *Humphries*, 454 F.2d 1279, 1283, 20 W.H. Cases 444, 447 (10th Cir. 1972).

It is thus puzzling to understand the reluctance of the court below to give effect to the overall statutory scheme of ADEA. The court's extensive discussion of Title VII cases is misplaced in light of the asymmetrical procedural structures of the two statutes. Contrary to the view expressed below, the similarities between Title VII and ADEA are limited to their prohibitive sections. There the parallel ends, for each law embodies its own distinct enforcement provisions. "[T]he legislative history and the statutory language [of the ADEA] make clear that Congress intended to and did provide distinct enforcement procedures" under the ADEA. *Naton* v. *Bank of California*, 14 FEP Cases 166, 170 (N.D. Cal. 1976). No language expressly providing for notice of intent to sue to prospective defendants as a condition precedent to suit appears in Title VII. Thus, Congress's deliberate incorporation in Section 7(d) of the ADEA of such a specific requirement cannot be ignored by the Court.[8]

The *Amicus*, EEAC, submits that in the context of the statute before the Court, no right of action accrues to individuals *unless* they have first timely given notice of intent to sue. Once such condition precedent is satisfied, they have to bring suit within the prescribed statute of limitations "from the date the cause of action accrues". 29 USC 255(a). Thus, the 180-day notice provision is an essential thread in the fabric of the statute and represents a limitation upon the power of the federal district courts to entertain an age discrimination suit.

B. The Overwhelming Judicial Authority Has Sustained The Mandatory Nature Of The Jurisdictional Requirement Of Timely Notice Under The Act.

In reversing the district court, the Circuit below discounted the determinations of the Fifth, Sixth and Eighth Circuits and numerous district courts to the effect that Section 7(d)'s requirement that a potential claimant file notice of intent to sue within

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[8] The most nearly comparable Title VII notice requirement is the proviso in 42 USC 2000e(5)(f)(1) that a private individual does not have the right to bring suit unless it has first received a notice from the EEOC. The giving of such notice by the Commission and its receipt by the prospective plaintiff has been interpreted by this Court as a jurisdictional precondition to maintenance of a Title VII suit in the courts. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

180 days of the alleged discrimination is a mandatory jurisdictional prerequisite to court jurisdiction over an age discrimination suit. We submit that the reasons cited by the Tenth Circuit for not adhering to this line of authority do not withstand scrutiny, and that, more importantly, the decision below serves to abrogate the carefully designed Congressional scheme for enforcement of the ADEA described above and to undermine the certainty which Congress intended.

Prior to the Tenth Circuit ruling in *Dartt*, the above three Circuit Courts of Appeal and numerous district courts[6] had all held that timely compliance with this notice provision is a jurisdictional requirement that must be met in order to commence a civil action under the Act. In *Hiscott* v. *General Electric Co.*, 521 F.2d 632, 633-634, 11 FEP Cases 292 (6th Cir. 1975), the court observed that this view was "supported by the legislative history of the Act which emphasizes the mandatory nature of the requirement that notice must be given to the Secre-

[6] See *e.g.*, *Hiscott* v. *General Electric Co.*, 521 F.2d 632, 633-634, n. 3, and 11 FEP Cases 292, 293 (6th Cir. 1975), and *Brohl* v. *Singer*, 407 F. Supp. 936, 12 FEP Cases 541 (M.D. Fla. 1976) and the extensive discussion in Shell's brief to the court here. Other courts have continued to construe the requirements of Section 7(d) as jurisdictional despite the Tenth Circuit's decision herein. E.g., *Looney* v. *Commercial Union Assurance Cos.*, 14 FEP Cases 843, 845 (E.D. Mich. 1977); *McCrickard* v. *Acme Visible Records, Inc.*, 409 F. Supp. 341, 343-344, 13 FEP Cases 822, 823-824 (W.D. Va. 1976); *Platt* v. *Burroughs Corp.*, 424 F. Supp. 1329, 1333-1335, 14 FEP Cases 1057, 1058-1061 (E.D. Pa. 1976) (No relief from jurisdictional prerequisite even where complainant asserted fear of retaliation).

tary." The Fifth Circuit, referring to such provision in *Edwards* v. *Kaiser Alum. & Chem. Sales, Inc.*, 515 F.2d 1195, 1199, 10 FEP Cases 1398, 1401 (5th Cir. 1975), reiterated its holding in *Powell* that "the 180-day notice provision is a mandatory jurisdictional condition precedent to suit." The Eighth Circuit confirmed that "most courts have regarded a timely filing of notice of intent to sue as a jurisdictional requirement". *Moses* v. *Falstaff Brewing Corp.*, 525 F.2d 92, 94, 11 FEP Cases 828, 830 (8th Cir. 1975).

Any doubts as to the correctness of this prevailing judicial interpretation of the express statutory provisions are dispelled by reference to the legislative history.[7] In summary of the major provisions of the final bill before the Congress, under "Investigation and enforcement", House Report No. 805 says:

> As was stated, aggrieved persons may similarly bring actions but a *condition precedent* to the bringing of action by an individual, is notice to the Secretary and the elapse of a period of 60 days. This is to allow the Secretary to mediate the grievance. 1967 US Code Cong. and Adm. News p. 2218. (emphasis added)

Yet, in the face of the wording of the Act, the other judicial authorities and the legislative intent, the Circuit Court below "remained unconvinced" that Congress intended the failure to file a notice within the 180-day period to prevent an individual from bringing a civil action under the Act. It is difficult to imagine how the Congress could have drafted language any clearer than it did. The conclusion of

[7] The legislative history of the Act is fully discussed in the brief of Shell Oil Company.

the Tenth Circuit below is simply untenable under a plain reading of the statute which, on its face, embodies an unequivocal, and mandatory condition precedent to the "commencement" of any civil action under ADEA.

The court below asserted that it was "not contend[ing] that a filing of a notice to sue is not a condition precedent to an action under the ADEA". 539 F.2d at 1260, 13 FEP Cases at 15.[a] Rather, it submitted that the explicit 180-day time limitation was not jurisdictional but essentially a "statute of limitation," a conclusion at variance with the structure of the entire Act. This done, the court then had to explain away the holding of two panel members in *Law* v. *United Airlines, Inc.*, 519 F.2d 170, 171, 12 FEP Cases 1084, 1085 (10th Cir. 1975), that "the lodging of the notice of intent to file a civil action under the subject [Age] Act was a jurisdictional prerequisite to plaintiff's alleged cause of action . . ."

Where the circuit below missed the mark was in failing to understand the statutory framework and confusing the 7(d) jurisdictional prerequisites with the 7(e) statute of limitations. The Fifth Circuit in *Powell* v. *Southwestern Bell Tele. Co.*, 494 F.2d 485, 487, 8 FEP Cases 1, 2 (1974), on the other hand, quite readily grasped the distinction:

> The notice requirement in no way supplants the statutory period of limitation engrafted from the Portal to Portal Act. Rather it is simply a prerequisite to the right to file any suit whatsoever under the ADEA.

[a] Indeed, it admitted that "ample authority" existed in support of such position. 539 F.2d at 1259, n. 2.

In *Ott* v. *Midland Ross Corp.*, 523 F.2d 136, 11 FEP Cases 539 (6th Cir. 1975), the Sixth Circuit found the timely jurisdictional prequisites of notice under 7(d) had been given but had a serious question whether suit had been brought within the statute of limitations of Section 7(e). It specifically rejected the defendant's contention that the latter provision was "jurisdictional" and remanded the case for trial on the issue of the statute of limitations only. A similar result occurred in *Platt* v. *Burroughs Corp.*, *supra*, where the district court denied a motion to dismiss on specific acts of discrimination as to which the plaintiff had given the 7(d) notice to the Secretary of Labor and were *not* barred by the three (3) year statute of limitations. These cases illustrate a correct understanding of the statutory scheme embodied in ADEA, with the courts properly differentiating between those procedural provisions which are jurisdictional and those which are conventional statutes of limitation.

In sum, the Court here is not faced with an issue of tolling, for in actual fact, no statute of limitations question is presented on this appeal.[b] The *Amicus* contends that the circuit below should never have reached any question of tolling in this case, because the mandatory notice requirements of Section 7(d)(1) are jurisdictional in nature and not a statute of limitations. An analysis of possible equitable fac-

[b] Thus this Court's decision in *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538 (1974), and related cases, are inapposite.

tors justifying tolling arises only where a statute of limitation is involved. EEAC submits that Congress has not left to this Court the task of prescribing the conditions precedent to bringing a private civil action under the Act.

This conclusion gains support from this Court's recent decision in *Int'l Union of Electrical Workers, Local 790* v. *Robbins & Myers, Inc., supra,* —— U.S. ——, 13 FEP Cases 1813 (1976). The thrust of the *Robbins & Myers* decision was that it is not within the power of the federal courts to alter Congressionally-imposed, mandatory jurisdictional requirements which specify the time within which a defendant must be notified of a lawsuit—even under humanitarian legislation such as that embodied in Title VII.

As the Court there said (—— U.S. at ——, 13 FEP Cases at 1817):

> [T]he principal answer to this contention is that Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a "slight" delay equally acceptable. In defining Title VII's *jurisdictional prerequisites* "with precision" [Citations omitted], Congress did not leave to the courts the decision as to which delays might or might not be "slight." (emphasis added) (footnote omitted).

This conclusion is even more applicable to the ADEA since the statutory language is "abundantly clear" on this point and the legislative history thoroughly supports the conclusion that Congress pro-

vided a limited private right to sue only for individuals who expeditiously met the statutory requirements.[10] *Powell, supra,* 494 F.2d at 487-488. Since Congress established the period in Section 7(d)(1) as a jurisdictional limitation, it must be construed *stricti juris.*[11]

Such a construction of Section 7(d)(1) is also consistent with the ruling of this Court and other courts in analogous situations. This Court held recently in *Johnson* v. *Railway Express Agency, Inc., supra,* 421 U.S. 454, 10 FEP Cases 817 (1975), that the timely pursuit of administrative Title VII remedies did not prevent the prescription of an individual's claims under 42 U.S.C. § 1981.[12] Similarly,

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[10] This is consistent with the Congressional design of the ADEA enforcement's provisions which make "private lawsuits . . . secondary to administrative remedies and suits brought by the Secretary of Labor." *Rogers* v. *Exxon,* —— F.2d ——, 14 FEP Cases 518, 523 (3rd Cir. 1977).

[11] See *Shelley* v. *Bayou Metals,* 14 FEP Cases 931, 932 (W.D. La. 1976) (Title VII case holding jurisdictional the requirement that suit be instituted within 90 days of receipt of "Right to Sue" letter).

[12] The Court had foreshadowed the decisions in *Robbins & Myers* and *Johnson* v. *Railway Express* with statements in several earlier cases. In *Alexander* v. *Gardner-Denver,* 415 U.S. 36, 47, 7 FEP Cases 81, 85 (1974), the Court had stated that Title VII vested the "federal courts with plenary powers to enforce the statutory requirements and it specifies *with precision the jurisdictional prerequisites* that an individual must satisfy before he is entitled to institute a lawsuit." (emphasis added). And in *McDonnell Douglas* v. *Green,* 411 U.S. 792, 5 FEP Cases 965 (1973), the Court referred to the timely filing of charges with the EEOC as a jurisdictional requirement under Title VII.

Title VII claims have repeatedly been held time-barred where alleged discriminatees have not filed suit within 90 days of receipt of a "Right to Sue" letter from the EEOC. The Courts "have generally held that the 90 day filing period is jurisdictional and mandatory" (*Pachero* v. *Phelps Dodge Corp.*, 531 F.2d 709, 13 FEP Cases 255, 256 (5th Cir. 1976) and cases there cited, thereby requiring that it be construed *stricti juris*. *Shelley* v. *Bayou*, *supra*, 14 FEP Cases at 932.

In sum, this case presents a statutory scheme that requires that this Court strictly construe the limitations period of Section 7(d)(1) in accord with the principles of *Robbins & Myers*, *Johnson* v. *Railway Express* and other cases [13] which have given effect to statutory limitations periods that Congress intended to be jurisdictional.

II. THIS COURT SHOULD NOT CREATE A SPECIAL EXCEPTION TO THE ACT'S JURISDICTIONAL PREREQUISITES.

In reality, Plaintiff Dartt does not seek tolling of the notice provisions of the Act, but rather a special exception excusing her from compliance with them. To accede to Plaintiff's position, however, would invite wholesale litigation over what "exceptional circumstances" would warrant nullifying the clear and precise language in the statute. Moreover, acceptance of that argument would encourage every potential litigant who has failed to comply with the notice requirements to plead for an exception in order to be allowed to maintain a suit.

[13] See *Kavanaugh* v. *Noble*, 332 U.S. 535 (1947); *A. J. Philips Co.* v. *Grand Trunk Western RR Co.*, 236 U.S. 662, 667 (1914); *Midstate Co.* v. *Pennsylvania RR Co.*, 320 U.S. 356, 364 (1943).

An equally important reason for not judicially modifying the statutorily-prescribed procedure for resolving age discrimination claims is that to do so would seriously undermine the effectiveness of the conciliation process which Congress viewed as the "most favored method of enforcement" of the ADEA. *Rogers* v. *Exxon Research & Engineering*, *supra*, —— F.2d ——, ——, 14 FEP Cases at 523 and n. 11.[14]

Congress vested primary responsibility for enforcement of the ADEA in the Secretary of Labor, who is required to "attempt to eliminate the discriminatory practice or practices alleged and to effect voluntary compliance . . . through informal methods of conciliation, conference, and persuasion" before a legal action can commence. ADEA, § 7(b), 29 U.S.C.

[14] The Congressional emphasis on conciliation, rather than private litigation, as the principal means of enforcing the ADEA is also discussed, e.g., at S. Rep. No. 723, 90th Cong., 1st Sess. 5 (1967); *Burgett* v. *Cudahy Company*, 361 F. Supp. 617, 621, 6 FEP Cases 201, 204 (D. Kan. 1973); Agatstein, The Age Discrimination in Employment Act of 1967: A Critique, 19 N.Y.L.F. 309, 319 (1973); *Brennan* v. *Ace Hardware*, 495 F.2d 368, 374, 7 FEP Cases 657, 661-662 (1974). Thus, it is beyond question that the entire "thrust of the ADEA's enforcement provisions is that private lawsuits are secondary to administrative remedies and suits brought by the Secretary of Labor." *Rogers*, *supra*, —— F.2d at ——, 14 FEP Cases at 523. Indeed, under the enforcement plan of the ADEA "private litigation is discouraged." Agatstein, Age Discrimination Act, *supra*, 19 N.Y.L.F. at 319. Accord: *Burgett*, *loc. cit.*

§ 626(b). *Sant* v. *Mack Trucks, Inc.*, 424 F. Supp. 621, 622, 13 FEP Cases 854, 855 (N.D. Cal. 1976); Procedural Aspects of the Age Discrimination in Employment Act of 1967, 36 U. Pitt. L. Rev. 914, 916 (1975).

To be sure, the Secretary may attempt to settle a claim of age discrimination even in the absence of notice that the claimant intends to file suit in district court. But discussion of settlement under such circumstances was not what Congress envisioned when it mandated a sixty-day conciliation period after notice of an impending private lawsuit. Courts considering Section 7(d)(1) have pointed out four important functions served by the requirement that timely notice of intent to sue be given in advance of the conciliation period. First, it insures that potential defendants become aware of their position and the real possibility of litigation soon after the allegedly discriminatory event, because the statute (Section 7(d)(2)) requires the Secretary to inform all prospective defendants of a proper notice of intent to sue. E.g., *Powell*, *supra*, 8 FEP Cases at 3.[15] Second, timely notice serves to promote good faith negotiations by employers during the statutory 60-day conciliation period. *Ibid.* Third, timely notice facilitates preservation of records and evidence for trial should conciliation fail. *Ibid.* Fourth, prompt notice provides the Secretary with the opportunity to invoke the preferred "conciliatory and mediative ac-

[15] See *Int'l Union Electrical Workers, Local 790* v. *Robbins & Myers, Inc.*, —— U.S. ——, ——, 13 FEP Cases 1813, 1817 n. 14 (1976) where the Court observed that "[a]dherence to the limitations period [of former section 42 U.S.C. § 2000e-5(d)] assures prompt notification to the employer of a charge of an alleged violation of Title VII."

tion to avert litigation" while a dispute is fresh. *E.g.*, *McCrickard* v. *Acme Visible Records, Inc.*, 409 F. Supp. 341, 343, 344, 13 FEP Cases 822, 823, 824 (W.D. Va., 1976).

There is no dispute that Shell did not receive prompt, specific notice of any intention of Dartt to file a civil action with respect to the alleged unlawful practice. The Tenth Circuit, however, suggested that Dartt's prompt presentation of an oral grievance to the local Wage and Hour office, which grievance was promptly communicated to Shell, accomplished these statutory ends. Plainly, this is not so. An employer who is told that a law suit will be filed against it if conciliation of an alleged ADEA violation fails, is able to conciliate the issue much more realistically than an employer who merely is notified that a grievance has been turned in. As one court has noted recently in holding the notice requirements of Section 7 to be jurisdictional, the "'notice determines the scope of the alleged violation and thereby serves to narrow the issues for prompt adjudication and decision.'" *Looney* v. *Commercial Union Assurance Cos.*, 14 FEP Cases 843, 844 (E.D. Mich. 1977), citing the Title VII decision in *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 720, 2 FEP Cases 121, 127 (7th Cir. 1969). The analogy is persuasive under the ADEA, for an ambiguous grievance or complaint, unlike a timely notice of intent to sue, cannot "narrow issue for prompt [conciliation and mediation]." Without the specific flagging of a potential private legal action, and the concomitant sharpening of issues, the impetus for *both* parties to pursue conciliation seriously with the active assistance of the Secretary is lacking.

The lapse of time permitted by the decision below undermines the chances of success for the conciliation which Congress mandated. Promptness is a factor Congress plainly considered *central* to the effectiveness of the non-legal methods it chose to promote. The jurisdictional requirement of Section 7(d)(1)

> is intended to serve the purposes of the Act by insuring that the Secretary of Labor is called in for conciliation purposes *when disputes are fresh* and by informing the employer of his employee's intentions at an early date. (emphasis added).

Moses v. *Falstaff Brewing Corp.*, 525 F. 2d 92, 94, 11 FEP Cases 828, 830 (8th Cir. 1975). Accord: *Platt* v. *Burroughs Corp.*, 14 FEP Cases 1057, 1060 (E.D. Pa. 1976); *McCrickard* v. *Acme Visible Records, Inc.*, *supra*, 13 FEP Cases at 823. The preferred conciliation remedy is reduced to a matter of form without substance when the dispute involved is stale. Strict compliance with the statutory notice requirements, on the other hand, promotes conciliation by ensuring that it takes place before the parties' positions have hardened and before the passage of time has caused substantial sums for backpay, benefits, or attorney fees [16] to accrue. Cf. *Rogers* v.

[16] The ADEA incorporates Section 16(b) of the FLSA (29 U.S.C. 216(b)), which section provides for the award of attorney's fees by the court in appropriate cases. See *Hodgson* v. *Miller Brewing Co.*, 457 F.2d 221, 20 WH Cases 500, 506 (7th Cir. 1971). If the 180-day period is strictly construed, an ADEA claimant usually will have incurred only minimal attorney fees at the time the Secretary conducts conciliation and mediation. Thus, large sums for this item will not be a barrier to successful conciliation and mediation.

Exxon, *supra*, 14 FEP Cases at 523-524. Certainly, the prospects for successful conciliation are diminished greatly where these sums have grown because timely notice has not been given.

A further consideration is that, although an employee may contact the Department with any sort of amorphous grievance which the Department may make some attempt to resolve, the statutory duty to use "exhaustive" efforts to settle a dispute devolves upon the Secretary for at least a 60 day period *only* after notice of intent to sue over a specific action is given. Section 7(d)(2) and see *supra*, pp. 8-9. This case illustrates that the Secretary's attempts to resolve a grievance or complaint do not meet the heavy burden of the statute (see *Brennan* v. *Ace Hardware*, *supra*) to conduct mediation and conciliation vigorously after notice of intended suit is filed. For the local Wage Hour Division did not attempt serious statutory conciliation until after Dartt's untimely notice of intent to sue—despite supposed earlier efforts to "conciliate" based on her grievance.

The Sixth Circuit analyzed the effect of the submission of a similar type complaint to the Labor Department by an individual alleging age discrimination in *Hiscott* v. *General Electric Co.*, 521 F.2d 632, 11 FEP Cases 292 (6th Cir. 1975). In that case, a Labor Department official had written to complainant Hiscott (*id.* at 293):

> I am not aware of your having notified the Secretary of Labor that you are instituting an action against the firm, which is a requirement of the [Age] Act. The fact that you submitted information concerning an alleged unlawful prac-

> tice to our agency is not considered such a notice.

The court cited and agreed with the district court decision herein, in holding that the Labor Department was correct in pointing out that (*ibid*):

> the mere furnishing of information to the agency concerning an alleged unlawful practice does not constitute notice of intent to sue as mandated by the statute. [citations omitted].[17]

As almost every court considering the issue has concluded, a potential defendant does not receive notice of an imminent lawsuit when the complainant files a written complaint with the Secretary (e.g. *Hiscott*), asks the Secretary to bring suit (e.g. *Powell*) or complains orally to the local Wage & Hour Office representative (e.g. *Acford* v. *Exxon Corp.*, 12 FEP Cases 1500, 1502 (D. Conn. 1975)).[18]

[17] The opinion expressed by the official in *Hiscott* was consistent with the Department's interpretation of the requirements for complying with Section 7(d) as expressed in an administrative opinion letter issued shortly after the effective date of the ADEA. Thus, Assistant Secretary of Labor Donahue stated (BNA FEP Manual 401:5212) (issued Aug. 26, 1968):

> No particular form is necessary in order to notify the Secretary of Labor of an intent to file suit under the Age Discrimination in Employment Act. Such notice should be provided in writing, however, . . .

See *Burgett* v. *Cudahy, supra*, 361 F. Supp. at 621, 6 FEP Cases at 204. The § 7(d)(1) notice must "contain the basic facts which will enable the Secretary to perform his functions . . . [and] be provided in writing." *Ibid.*

[18] Accord: *Powell, supra*, 494 F.2d at 489, 8 FEP Cases at 4; *Burgett* v. *Cudahy Co., supra*, 361 F. Supp. at 621, 6 FEP Cases at 204.

In sum, the incomplete and ineffective "notice" rejected in such cases, but held to trigger tolling herein, assures that the conciliation-mediation function cannot occur in the framework Congress intended. The framework Congress contemplated and required through the explicit requirements of § 7(d)(1) is one where the parties enter the conciliation process with a fresh dispute and are unequivocally advised that a private lawsuit will almost inevitably follow unsuccessful conciliation.

CONCLUSION

For the foregoing reasons, the *Amicus Curiae* submits that the district court correctly construed Section 7(d)(1) of the ADEA, and that the judgment of the court of appeals should be reversed with directions to reinstate the order of the district court dismissing the complaint.

Respectfully submitted,

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No. 76-678

Supreme Court, U. S.
SEP 23 1977
MICHAEL RODAK

In the Supreme Court of the United States

OCTOBER TERM, 1977

SHELL OIL COMPANY, PETITIONER

v.

ANNE M. DARTT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE

WADE H. MCCREE, JR.,
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The Solicitor General on behalf of the United States moves for leave to file a brief as *amicus curiae* after the time specified by Rule 42(2). Cf. Rule 42(4).

1. This case presents an important question concerning the notice requirement pertaining to private actions brought under the Age Discrimination in Employment Act (ADEA), 81 Stat. 602, as amended, 29 U.S.C. 621 *et seq*. The issue is of particular concern to the Secretary of Labor who is charged with a variety of enforcement responsibilities under the Act, and to the Equal Employment Opportunity Commission because similar questions may arise under Title VII of the Civil Rights Act of 1964, 78 Stat. 753, as amended, 42 U.S.C. 2000e *et seq*. The interest of the United States is more fully described at pages 3-5 of the brief that is now lodged with the Clerk.

2. Petitioner's brief was served on the government on May 10, 1977. Initial responsibility for drafting this brief was assigned by the Solicitor General on May 11, 1977, to the Fair Labor Standards Division of the Office of the Solicitor or Labor, which has responsibility for appellate litigation under the ADEA. That office had previously been notified on February 24, 1977, of this Court's grant of certiorari on February 22, 1977, and of its assignment to prepare a draft brief as *amicus curiae*. In the last several months, that office has experienced unusually severe staff shortages and temporary workload increases that unavoidably delayed completion of an adequate presentation of the position of the United States. For most of that time, two appellate supervisory positions were vacant, in addition to the Associate Solicitor's position which is normally charged with the direction of Supreme Court litigation. A number of other legal positions in the appellate staff also remained unfilled for considerable periods. Moreover, congressional committees at the same time were highly active, and the Fair Labor Standards Division was charged with substantial research and consulting responsibilities in connection with the testimony of Department officials and with the drafting of language for proposed amendments to the Fair Labor Standards Act and the Age Discrimination in Employment Act.

3. Because of the limited discussion of the issues in the brief submitted by respondent, and because the implications of those issues extend beyond the direct interests of the Secretary, it was necessary for the office of the Solicitor of Labor to develop and revise several drafts of the brief to reflect the concerns of the Equal Employment Opportunity Commission, the office of the Solicitor General, and the Department of Labor. A draft brief was submitted to the Solicitor General on August

18, 1977. Review and revision of the brief in the office of the Solicitor General entailed consultation between the three offices concerning the legislative history of the provisions in question and similar provisions of Title VII. Final preparation and printing of the brief were further delayed because of the heavy volume of other briefs in this Court under simultaneous preparation, and particularly the need to give priority to briefs in cases scheduled for October argument or for the Court's opening conferences, and to petitions and jurisdictional statements.

4. Since the Court has not yet set this case for oral argument, there remains an adequate opportunity for the petitioner and respondent to take into account the position of the United States in the further presentation of their cases and to file any reply they may wish to the views expressed in our brief. The United States therefore requests that it be permitted to file a brief as *amicus curiae* at this time.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

CARIN ANN CLAUSS,
Solicitor of Labor,
Department of Labor.

SEPTEMBER 1977.

DOJ-1977-09

Supreme Court, U. S.
FILED
SEP 20 1977
MICHAEL RODAK, JR., CLERK

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-678

SHELL OIL COMPANY, PETITIONER

v.

ANNE M. DARTT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (App. 26–36) is reported at 539 F. 2d 1256. The district court's opinion (App. 10–25) is not officially reported but is unofficially reported at 10 FEP Cases 844, 9 EPD ¶10,205.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1976, and a petition for rehearing and suggestion for rehearing *en banc* was denied on August 19, 1976. The petition for a writ of certiorari was filed on November 15, 1976, and was granted on

February 22, 1977. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court properly tolled the running of the 180-day time limit on the notice of intent to sue required by Section 7(d) of the Age Discrimination in Employment Act where the lodging of an oral complaint with the Secretary of Labor achieved substantial and timely compliance with the purpose of the notice requirement.

2. Whether when interpreted in light of its legislative purpose the notice requirement of Section 7(d) is satisfied when an aggrieved person lodges a timely complaint of age discrimination that does not explicitly refer to an intent to file suit.

STATUTE INVOLVED

Section 7(d) of the Age Discrimination in Employment Act of 1967, 81 Stat. 604, as amended, 29 U.S.C. 626(d), provides:

> No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> (2) in a case to which section 14(b) applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

INTEREST OF THE UNITED STATES

Congress has conferred upon the Secretary of Labor part of the responsibility to effectuate the purpose of the Age Discrimination in Employment Act ("ADEA" or "Act") to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment" (29 U.S.C. 621(b)). The Department of Labor is charged with investigating complaints of age discrimination in employment and attempting to eliminate "through informal methods of conciliation, conference, and persuasion" practices that violate the Act (29 U.S.C. 626(a) and (b)). Should the Secretary fail to achieve voluntary compliance, he is empowered to bring suit in federal district court for such relief as may be appropriate (29 U.S.C. 626(b)).

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Congress also provided in the ADEA for private actions by "[a]ny person aggrieved" by age discrimination in employment (29 U.S.C. 626(c)). The effectiveness of the private enforcement alternative is of crucial importance to the Secretary due to the magnitude of the Act's coverage[1] and a rapidly increasing number of age discrimination complaints.[2] For example, while the Secretary of Labor received 5,121 complaints and filed 47 suits during calendar year 1976, in the same one-year period more than 300 private enforcement actions were filed in the federal district courts.[3] In addition, by providing an effective alternative to suit by the Secretary, private enforcement actions free the Secretary to devote the limited public resources that have been made

[1] The ADEA is applicable to all personnel actions of any employer, with 20 or more employees, in any industry affecting interstate commerce. It applies also to recruiting, advertising and referrals by employment agencies serving covered employers, and to specified actions by unions that have 25 or more members and represent or seek to represent the employees of such employers. 29 U.S.C. 623 and (Supp. V) 630. The Act protects all individuals who are at least 40 years of age but less than 65 years of age. 29 U.S.C. 631.

[2] Complaints filed with the Secretary of Labor in fiscal years 1972, 1973, 1974, 1975, and 1976 numbered, respectively, 1862, 2208, 3040, 4717, 5121. United States Department of Labor, *Age Discrimination in Employment Act of 1967: A Report Covering Activities Under the Act During 1976*, p. 8 (1977) ("*Age Discrimination Report*").

[3] *Age Discrimination Report*, *supra*, at p. 19. In the first six months of calendar year 1977, the Secretary filed 26 suits under the Act as compared to more than 200 suits by aggrieved individuals. See 2 *Title VII Monitor*, Nos. 3–8 (March–August 1977) (Want Publishing Co., Washington, D.C.).

available (see 29 U.S.C. (Supp. V) 634) to cases of significant precedential value and to those arising out of company-wide patterns and practices. Cf. *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 211.

Procedural problems have severely reduced the efficacy of private enforcement actions; approximately half of all reported private actions under the ADEA have been dismissed at least in part on procedural grounds. The notice requirement in Section 7(d) is the most common basis for dismissal;[4] judicial construction of that Section has frustrated achievement of the purposes of the ADEA in a significant number of cases. *E.g.*, *Eklund* v. *Lubrizol Corp.*, 529 F. 2d 247 (C.A. 6); *Powell* v. *Southwestern Bell Telephone Co.*, 494 F. 2d 485 (C.A. 5). The United States therefore has a substantial interest in the instant case, in which this Court examines the Act's notice requirement for the first time.

STATEMENT[5]

1. On July 31, 1973, petitioner's Credit Card Center in Tulsa, Oklahoma, discharged respondent, then 51

[4] *Age Discrimination Report*, *supra*, at p. 22.

[5] Petitioner's statement of facts (Br. 3–8) repeatedly relies on an affidavit filed in the court of appeals by Kenneth Jacobs, its Manager of Employee Relations (see App. 81–83). The affidavit purports to supplement testimony given by Mr. Jacobs during the hearing in the district court on petitioner's motion to dismiss the suit (see App. 49–50). It presents statements which conflict in several respects with testimony also given in the district court hearing by J. Dean Speer, the Assistant Area Director of the

years of age, from her employment (App. 11). Believing that her discharge was prompted by her age, respondent promptly consulted a local attorney, who told her that it was unnecessary to retain counsel to challenge her discharge, and that she should instead complain to the Wage and Hour Division of the Department of Labor (App. 27).[6] Following that advice, she met with J. Dean Speer, the Department's Assistant Area Director for Wage-Hour in Tulsa on August 9, nine days after the discharge (App. 11, 27).[7] Speer interviewed her and filled out a complaint form indicating the substance of her charge of age discrimination (App. 27; Tr. 116).[8] He told her that the complaint

Wage and Hour Division of the Department of Labor (See App. 53–67). Neither that affidavit nor one similarly filed by Warren D. Landis, Acting Administrator of the Wage and Hour Division (see App. 76–80), were before the district court or part of the record on appeal. We doubt that these affidavits are properly before the Court and we accordingly omit reference to them.

[6] Petitioner states (Br. 3–4) that respondent contacted two attorneys prior to going to the Department. But the testimony to which petitioner refers (App. 48), as well as other portions of the record, indicate that respondent "called a friend, [not said to be an attorney,] who referred [her] to an attorney" belonging to the same women's club as she (App. 49, also 42).

[7] The district court's finding reads "September 9, 1974," but this is an apparent transcription error as appears from the term "shortly after her termination" in the same sentence (App. 11). The court of appeals states that the meeting was on August 9 (App. 27; also 50, 53).

[8] "Tr." refers to the transcript of the hearing in the district court. In a portion of the transcript not reproduced in the Appendix, Mr. Speer testified that he "did question [respondent] about the facts of the case * * * [and] did fill out [the Department's] internal form indicating the substance of her complaint" (Tr. 116).

would be investigated and that it might take a year (App. 12, 27). He did not tell her that she had a right to maintain a private law suit under the Act (App. 12).

On the same day, Speer informed petitioner by telephone that respondent had filed a complaint charging age discrimination in violation of the ADEA (App. 27, 63). Shortly thereafter Speer began a series of conciliation conferences with petitioner's manager of employee relations (App. 27–28, 50, 59, 63). These efforts were unsuccessful (App. 28, 55, 56), and Speer assumed "an investigative posture" (App. 28, 54) in order "to make a determination as to whether or not, in [his] opinion, [respondent] had suffered discrimination on the basis of age" (App. 56). In November 1973 petitioner agreed to prepare and submit internal studies and statistical information relating to various aspects of its employment practices (App. 28, 55, 56).

While these proceedings were pending, respondent repeatedly made telephone inquiries to the Wage-Hour office concerning the progress of her case and on each occasion was told that she would be notified of any action taken (App. 12). On March 5, 1974, Speer notified respondent by letter that there would be further delay in completing the investigation since he had not received the statistical information promised by petitioner, but that she was entitled to file a private suit (App. 12, 28, 69). The letter noted that there were time limits governing the filing of such

suits, and it called attention to page 4 of an accompanying pamphlet, which discussed the Section 7(d) notice provision (App. 68, 74). The letter was sent on the 217th day after the alleged discrimination had occurred.

Upon receiving the Department's notification, respondent promptly retained counsel, who, within nine days of the date of Speer's letter, mailed a formal notice to the Department of Labor that his client intended to file a private suit against petitioner (App. 7, 12). Speer thereafter renewed his conciliation efforts, again without success, and on May 16, 1974, he notified respondent's counsel that conciliation had failed (App. 28, 55). On May 21, 1974, respondent filed the instant suit in the United States District Court for the Northern District of Oklahoma (App. 1).

2. On February 6, 1975, the district court entered an order dismissing the present action on the ground that respondent had not complied with Section 7(d)(1) of the ADEA, 29 U.S.C. 626(d)(1), which requires that a "notice of intent to sue" under the Act "be filed * * * within [180] days after the alleged unlawful practice occurred." The court held that the notice-to-sue provision creates an absolute jurisdictional prerequisite to the maintenance of private enforcement actions and that the time requirement must be strictly enforced regardless of any equitable considerations (App. 10-25). The court of appeals reversed (App. 26–36), holding that it could "not

fault [respondent] in her efforts to present her cause" and since petitioner was not prejudiced "either presumptively or in fact" by the lateness of respondent's filing of a notice of intent to sue with the Secretary, proper regard for the objectives of the Act required equitable tolling of the period for filing from the time of the lodging of respondent's complaint with the Secretary and consideration of the case on its merits (App. 36).

SUMMARY OF ARGUMENT

I

The Age Discrimination in Employment Act (ADEA) was adopted in 1967 as an extension of the policy against employment discrimination embodied in Title VII of the Civil Rights Act of 1964. Congress intended in the ADEA to simplify the procedures utilized in Title VII to permit speedy enforcement through court suits by aggrieved individuals or the Secretary of Labor. It was hoped that these streamlined procedures would avoid the procedural stumbling blocks encountered by Title VII plaintiffs which are "always unfortunate, but particularly so in the case of older citizens to whom, by definition, relatively few productive years are left." 113 Cong. Rec. 7076 (1967). While age discrimination plaintiffs need not obtain any right-to-sue letter, the Secretary of Labor is required to attempt to eliminate any unlawful practice "by informal methods of conciliation, conference, and persuasion" before suit is initiated by either a private individual or the Secretary himself. 29 U.S.C. 626(b) and (d). To guarantee his oppor-

tunity to conciliate, private plaintiffs must afford the Department of Labor 60 days' "notice of intent to sue." Section 7(d)(1 of the Act provides that the notice "shall be filed * * * within one hundred eighty days after the alleged unlawful employment practice occurred." 29 U.S.C. 626(d)(1). Petitioner's principal argument is that this 180-day period is an inflexible time limit that cannot be tolled under principles generally applicable to statutes of limitations.

A. In determining whether tolling is permissible "the proper test is * * * whether tolling the limitation in a given context is consonant with the legislative scheme." *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538, 557–558; *Burnett* v. *New York Central Railroad Co.,* 380 U.S. 424, 427. The purpose of the Section 7(d) notice requirement is to "allow time for the Secretary to mediate the grievance." S. Rep. No. 723, 90th Cong., 1st Sess. p. 5 (1967). The notice triggers the Secretary's responsibility to initiate conciliation under Section 7(d) at a time when voluntary settlement is not inhibited by the hardening of positions and by the accumulation of large claims for back pay.

These statutory objectives were fully satisfied here by respondent's prompt filing of a claim with the Department of Labor within nine days of the alleged discrimination. The Department promptly notified petitioner of the nature of the claim and as required by Section 7(b) initiated "informal methods of conciliation, conference, and persuasion" identical in nature to that triggered by the notice of intent to sue under Section 7(d). The Secretary of Labor had a full

opportunity to carry out his conciliation responsibilities under the Act, and the employer had full and timely notice of what he needed to know in the event that settlement out of court should fail and suit be initiated by either the private individual or the Department of Labor. No further benefit would have accrued to either the employer, the Secretary, or the public had the original complaint explicitly indicated an intent to sue. This is accordingly a case in which "the congressional purpose is effectuated by tolling the statute of limitations" *Burnett* v. *New York Central Railroad Co., supra,* 380 U.S. at 427.

B. The language and history of the Act contain no indication that Congress intended to preclude absolutely the claims of elderly employees whose notices failed to meet the time requirements of Section 7(d). The timing requirement is stated in the familiar terminology of statutes of limitations. Indeed, the language tracks the wording of the charge filing period in Title VII that has been recognized as establishing a statute of limitations (*Occidental Life Insurance Co.* v. *Equal Employment Opportunity Commission,* No. 76–99, decided June 20, 1977, slip op., pp. 15–16), subject to tolling for equitable considerations. See *Reeb* v. *Economic Opportunity Atlanta Inc.,* 516 F. 2d 924, 926–929 (C.A. 5) *Laffey* v. *Northwest Airlines, Inc.,* C.A.D.C., Nos. 74–1791, 75–1334, decided October 20, 1976, amended September 8, 1977. The 180-day time period of Section 7(d) was referred to in the legislative history as a "statute of limitations" and not as an absolute jurisdictional prerequisite to suit. Hearings on H.R. 3651, 3768, and 4221 (Age Discrimination in Employment) before the Gen-

eral Subcommittee on Labor of the House Committee on Education and Labor, 90th Cong., 1st Sess., p. 63 (1967) (House ADEA Hearings). There is, accordingly, no basis for concluding that the "recogniz[ed] judicial power to toll such statutes" (*American Pipe & Construction Co.* v. *Utah, supra,* 414 U.S. at 558) does not apply.

C. As the court of appeals stated, "[t]his is not a case of a plaintiff sleeping on her rights nor a defendant who is in any way being prejudiced thereby either presumptively or in fact" (App. 36). Respondent moved within days to assert her rights under the Age Discrimination in Employment Act, and in turn the Department of Labor promptly moved to conciliate her claim. This case is therefore governed by this Court's decision in *Burnett, supra,* to toll the statute of limitations in circumstances where the employer "could not have relied upon the policy of repose embodied in the limitation statute, for it was aware that [the employee] was actively pursuing his * * * remedy * * *" (380 U.S. at 430). In contrast to the situation in *Electrical Workers* v. *Robbins & Myers, Inc.,* 429 U.S. 229, where this Court refused to toll a Title VII claim while petitioner pursued a contract right, respondent here pursued an administrative remedy based upon the same statutory cause of action as the suit itself (29 U.S.C. 623(a)), and presented the same legal and factual questions for resolution. The Secretary's resulting conciliation efforts were performed under the mandate of the Age Discrimination Act, and were precisely what was

required by the provision upon which petitioner relies. Tolling was appropriate because the purposes of the time limitation have been satisfied and "the humanitarian purpose of the [Act] makes clear that Congress would not wish a plaintiff deprived of his rights when no policy underlying the statute of limitations is served by doing so" (*Burnett, supra,* 380 U.S. at 434).

II

The court of appeals' decision is equally sustainable on the ground that the lodging of a timely complaint with the Department of Labor asserting the aggrieved person's rights under the Act satisfied the Section 7(d) notice requirement. Although Section 7(d) literally requires a "notice of an intent to file [a civil] action," this Court has looked beyond the words to the purpose of the Act "[w]hen [the plain] meaning has led to absurd or futile results." *United States* v. *American Trucking Ass'ns,* 310 U.S. 534, 543. Here respondent's original complaint to the Secretary, while making no express reference to an intent to sue, invoked the employee's rights under the Act, and satisfied all the notice and conciliation goals of Section 7(d). The Act should not be interpreted to require forfeiture of statutory rights because of verbal variances in the employee's notice to the Secretary that cause no prejudice to any party in interest and that have no relation to any of the purposes of the Act. In a comparable context, this Court has declined to require literal compliance where the steps taken fulfilled the legislative objectives of the statu-

tory procedural provisions, and literal compliance "would serve no purpose other than the creation of an additional procedural technicality." *Love* v. *Pullman,* 404 U.S. 522, 526. The Court's analysis in *Love* v. *Pullman* is equally compelling in the context of the Age Discrimination in Employment Act, which depends to an even greater extent upon private enforcement to achieve its goals, and where as in *Love* "laymen, unassisted by [private] lawyers initiate the process." 404 U.S. at 527. A strictly literal construction of Section 7(d) should be rejected, and the lodging with the Secretary of Labor of a complaint that is sufficient to initiate the Secretary's conciliation efforts should be held to satisfy the statutory notice requirement.

I

ARGUMENT

THE 180-DAY REQUIREMENT FOR NOTICE OF INTENT TO SUE IS SUBJECT TO EQUITABLE TOLLING AT LEAST WHERE SUBSTANTIAL COMPLIANCE WITH CONGRESSIONAL INTENT IS ACHIEVED BY THE TIMELY FILING OF A DISCRIMINATION CLAIM WITH THE SECRETARY OF LABOR

The Age Discrimination in Employment Act was adopted in 1967 as an extension of the policy against employment discrimination embodied in Title VII of the Civil Rights Act of 1964 (78 Stat. 253, as amended, 42 U.S.C. (Supp. V) 2000e *et seq.*).[9] S. Rep. No. 723, 90th Cong., 1st Sess., pp. 1–2 (1967); H.R. Rep. No. 805, 90th Cong., 1st Sess., pp. 1–2 (1967). The prohibitory provisions of the ADEA are for the

[9] See Title VII, Section 715, 42 U.S.C. ~~(Supp. V.)~~ 2000e–14. See also 110 Cong. Rec. 2596–2599, 9911–9913, 13490–13492 (1964).

most part identical with those of Title VII except that "age" has been substituted for "race, color, religion, sex, or national origin". See *Hodgson* v. *First Federal Savings and Loan Ass'n,* 455 F. 2d 818, 820 (C.A. 5).

With respect to enforcement, however, the congressional authors of the ADEA departed significantly from the pattern of Title VII. The original "Administration bill," which borrowed enforcement provisions from both Title VII and the National Labor Relations Act,[10] met with substantial opposition from legislators who feared that the establishment of another special bureaucracy would produce "the same delays which plague * * * the EEOC and the NLRB." 113 Cong. Rec. 7076 (1976) Senator Javits, the principal sponsor of the age discrimination legislation (S. Rep. No. 723, *supra,* at p. 13), characterized these procedural stumbling blocks as "always unfortunate, but * * * particularly so in the case of older citizens to whom, by definition, relatively few pro-

[10] Under that bill, the Secretary—like the Equal Employment Opportunity Commission (EEOC) under Title VII—would investigate a charge of discrimination, determine reasonable cause to proceed, and seek voluntary elimination of any unlawful practices. Compare S. 830, § 7(a), 90th Cong., 1st Sess., 113 Cong. Rec. 2795 (1967) with 42 U.S.C. 2000e–5(a). The EEOC had no enforcement powers of its own at the time, and could only issue a right-to-sue letter to the claimant or, in certain cases, recommend suit to the Attorney General. 42 U.S.C. 2000e–5(e). The Administration's age bill gave the Secretary independent enforcement powers like those of the National Labor Relations Act (49 Stat. 449, as amended, 29 U.S.C. 151 *et seq.*) and thus did not provide for enforcement by private lawsuit. Compare S. 830, § 7(b), 90th Cong., 1st Sess., 113 Cong. Rec. 2795 (1967) with 29 U.S.C. 160.

ductive years are left." (113 Cong. Rec. 7076 (1967)).[11] Senator Javits proposed to follow instead the Fair Labor Standards Act of 1938 (52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*), which relies for enforcement exclusively on court suits brought by aggrieved individuals or the Secretary of Labor. See S. 788, 90th Cong., 1st Sess., 113 Cong. Rec. 2199–2200 (1967); S. Amendment Nos. 125, 126, 113 Cong. Rec. 7077 (1967). "By utilizing the courts [directly] * * * as the forum to hear cases arising under the law," it was hoped that the problem of procedural roadblocks would be "largely avoided." 113 Cong. Rec. 7076 (1967).[12]

The enforcement provisions that were adopted as a result of Senator Javits's efforts are designed to simplify procedures for the new class of discrimination complainants, and relieve them from procedural impediments that had burdened race and sex claimants under Title VII. The Act omitted many of the administrative steps interposed by Title VII before the private complainant could file suit, including the

[11] See also Hearings on S. 830, S. 788 (Discrimination in Employment) before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., p. 24 (1967) (Senate ADEA Hearings).

[12] As reported out, the nearly identical Senate and House bills both adopted the enforcement scheme suggested by Senator Javits. See S. 830, § 7, 90th Cong., 1st Sess., 113 Cong. Rec. 31248–31249 (1967); H.R. 13054, § 7, 90th Cong., 1st Sess., 113 Cong. Rec. 34739 (1967). Senator Yarborough, who sponsored and managed S. 830 for the Administration (113 Cong. Rec. 2467, 31252 (1967)), referred to the enforcement provisions as "amendments offered in the Committee by the distinguished senior Senator from New York [*i.e.*, Senator Javits], which were adopted and made a part of the Senate bill." 113 Cong. Rec. 35055 (1967).

agency's determination of reasonable cause after investigation (42 U.S.C. 2000e–5(a)) and its issuance of a right-to-sue letter after attempted conciliation (42 U.S.C. 2000e–5(e)).[13] Nevertheless, the conciliation role of the enforcement agency was retained and the Act established procedures designed to provide an opportunity for the Department of Labor to attempt to resolve age discrimination complaints by informal methods. Thus, before either a private enforcement action or an action by the Secretary may be brought,[14]

[13] The requirements of Title VII that the initial submission to the agency be "in writing" and "under oath" were omitted (see 42 U.S.C. 2000e–5(a)). The period for submission was extended from 90 to 180 days of the occurrence of the discrimination, as under Title VII at that time (see 42 U.S.C. 2000e–5(d)). Omitted was any provision restricting private suits to the period within 30 days of receiving notice from the agency that its administrative efforts had been completed (see 42 U.S.C. 2000e–5(e)).

The Act also relaxed the Title VII requirement that an aggrieved individual must initiate proceedings with an appropriate state or local government agency 60 days *before filing a charge* with the EEOC (42 U.S.C. 2000e–5(b). It was modified to require that proceedings pending in an appropriate state agency be permitted to run 60 days *before filing a lawsuit* under the federal Act (29 U.S.C. 633(b)). The legislative history explicitly shows that this change was made to permit "concurrent" (rather than consecutive) federal and state administrative proceedings under the ADEA. S. Rep. No. 723, 90th Cong., 1st Sess., p. 6 (1967); H.R. Rep. No. 805, 90th Cong., 1st Sess., p. 6 (1967).

[14] The statutory cause of action is based on making it unlawful to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a). The Secretary of Labor is empowered to bring suit in federal district court for appropriate relief. 29 U.S.C. 626(b). The ADEA also provides for private actions by "[a]ny person aggrieved" by age discrimination in employment. 29 U.S.C. 626(c).

the Secretary is required to attempt to eliminate any unlawful practice "by informal methods of conciliation, conference and persuasion." 29 U.S.C. 626(b) and (d). In order to enable the Secretary to carry out his responsibilities prior to the filing of any private suit, the Act requires the person alleging age discrimination to afford the Secretary at least 60 days' "notice of intent to sue." 29 U.S.C. 626(d). The Act provides that the notice "shall be filed * * * within one hundred and eighty days after the alleged unlawful practice occurred."[15] 29 U.S.C. 626(d)(1). Lodging a claim of discrimination (not specifically referring to intent to sue) with the Secretary of Labor triggers an identical conciliation responsibility under 29 U.S.C. 626(b) as well as the possibility of suit by the Secretary. A limit of two years from the date of the alleged violation is provided for the actual filing of any suit, after which "every such action shall be forever barred."[16] 29 U.S.C. 626(e) and 255(a).

Petitioner's primary contention is that Congress intended to terminate the rights of elderly workers for late filing of their formal notices of intent to sue without regard to whether the actions taken by employees in lodging their claims or by the Secretary of Labor in attempting conciliation fulfilled the purposes of the Section 7(d) notice requirement. While

[15] Where the alleged discrimination occurs in a state having its own age discrimination-in-employment law and enforcement agency (which is not the case here), the period is 300 days. 29 U.S.C. 626(d)(2) and 633(b).

[16] The period is extended to three years in the case of "willful" violations. 29 U.S.C. 255(a).

the filing of a notice with the Secretary is doubtless a condition precedent to the bringing of an action, it does not follow that Congress intended the designated 180-day period to constitute an inflexible limit that cannot be tolled under equitable principles generally applicable to statutes of limitations. As we show below, where the purposes of the notice requirement have been fulfilled in a timely fashion, nothing in the language, history, or policies of Section 7(d) should preclude an equitable tolling designed to advance the fundamental remedial purposes of the statute.

A. TOLLING AFTER A CLAIM HAS TIMELY BEEN LODGED WITH AND ACTED UPON BY THE SECRETARY OF LABOR IS FULLY CONSISTENT WITH THE LEGISLATIVE INTENT TO PROVIDE THE SECRETARY, AND THROUGH HIM THE EMPLOYER, WITH NOTICE OF POTENTIAL LITIGATION BEFORE THE POSSIBILITY OF CONCILIATION HAS BEEN INHIBITED BY THE PASSAGE OF TIME AND THE ACCUMULATION OF BACK PAY CLAIMS

In determining whether tolling is permissible, "[t]he proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme." *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538, 557–558. The tolling determination requires reference to the "purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act." *Burnett* v. *New York Central Railroad Co.,* 380 U.S. 424, 427.

The precise purpose of the Section 7(d) notice requirement is specified in the legislative history and emphasized by its function in the statutory framework. The legislative reports accompanying Section 7(d) state that the purpose of mandating notice to the Secretary before filing suit was "to allow time for the Secretary to mediate the grievance." S. Rep. No. 723, 90th Cong. 1st Sess., p. 5 (1967); H.R. Rep. No. 805, 90th Cong., 1st Sess., p 5 (1967) The statutory framework also reflects that goal; notice triggers the Secretary's statutory responsibility to "promptly notify all persons named therein as prospective defendants in the action and * * * promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion."[17] 29 U.S.C. 626(d). The 180-day time limitation assures that the Secretary will be able to undertake the prescribed mediation efforts before voluntary settlement is inhibited by the hardening of positions and by the accumulation of large claims for back pay. No other action is required in consequence of the prescribed notice to the Secretary and, however ineptly the grievant's notice is worded, no prejudice results so long as the persons charged are notified of the claim asserted and the Secretary undertakes the requisite efforts to bring about voluntary settlement.

[17] Compare the purposes of the corresponding provision in Title VII (42 U.S.C. 2000e-5(b)), of which the courts have said: "First, it notifies the charged party of the asserted violation. Secondly, it * * * permits effectuation of the Act's primary goal, the securing of voluntary compliance with the law." *Williams* v. *General Foods Corp.*, 492 F. 2d 399, 404 (C.A. 7); *Equal Employment Opportunity Commission* v. *MacMillan Bloedel Containers, Inc.*, 503 F. 2d 1086, 1092 (C.A. 6); *Evans* v. *Sheraton Park Hotel*, 503 F. 2d 177, 183 (C.A. D.C); *Gamble* v. *Birmingham Southern Railroad Co.*, 514 F. 2d 678, 687 (C.A. 5).

The statutory objectives of Section 7(d) were fully satisfied here by the prompt filing of a claim with the Secretary of Labor within nine days of the alleged discrimination. Immediately upon the grievant's assertion of rights under the Act, the Department notified petitioner of the nature of the claim and promptly initiated a process of informal conciliation, conference, and persuasion, in which the employer participated to the point of impasse. Petitioner (Br. 54) and the amicus Equal Employment Advisory Council (Br. 23) mistakenly claim that the Secretary's conciliation efforts would have been more intensive if a formal notice of intent to sue had been filed. The statutory duty of the Secretary to conciliate after the filing of a complaint (29 US.C. 626(b))[18] and after a notice of intent to sue (29 U.S.C. 626(d)) is identical. The Secretary sought again to conciliate after the filing of the formal notice of intent to sue (see App. 55) only out of scrupulous regard for the technical requirements of Section 7(d); the nature of the second conciliation effort was exactly the same as that initiated by respondent's original complaint. No further significant benefit would have accrued to the employer, the Secretary, or the public, had the original complaint to the Secre-

[18] 29 U.S.C. 626(b) states in pertinent part: "* * * [T]he Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion."

tary been more artfully formulated to indicate explicitly an intent to sue. The Secretary had full opportunity to carry out his conciliation responsibilities under the Act, and the employer had full and timely notice of what he needed to know in the event that settlement out of court should fail.

Petitioner asserts (Br. 27) that its settlement posture would have been different if it were "faced with definite notice of a threatened lawsuit" (see also Amicus Br. 21). But the filing of an intent-to-sue notice does not indicate that suit will definitely be filed upon the failure of conciliation. Nothing in the statute requires a person filing such a notice to sue imminently or to file suit at all. See 29 U.S.C. 626. Moreover, petitioner cannot claim that it conducted its conciliation negotiations on the assumption that there would be no litigation. As petitioner recognizes (Br. 50), ADEA enforcement suits can be brought by the Secretary without regard to whether the aggrieved individual has filed a "notice of intent to sue." An employer engaged in conciliation negotiations with the Secretary must anticipate the possibility of litigation if the conciliation efforts should fail, whether or not the individual complainant may sue.

These considerations show that the purposes of Section 7(d) were fully satisfied by the procedures followed in this case. In these circumstances, a refusal to apply traditional tolling principles would improperly frustrate the statutory purpose, especially since Congress' very choice of the phrase "notice of intent to sue" appears to have been merely an attempt to em-

phasize the contrast between Title VII—which in 1967 was construed to require agency action as a precondition to private suit—and the ADEA procedure permitting the filing of private suit independent of agency action.[19] There is nothing in the legislative history that suggests any congressional interest in assuring express reference to possible lawsuit in the notice to the Secretary. Instead the history shows that Congress intended to relax the procedural requirements which had led to frustration of rights and excessive delays in the enforcement

[19] The substitution of "notice of intent to sue" for "charge" simply recognizes that under the ADEA, the complainant is free to bring suit at the pescribed time without further action by the government agency. While the instant legislation was under consideration by Congress, several district courts held that exhaustion of administrative proceedings was a prerequisite to a private action under Title VII. *E.g.*: *Dent* v. *St. Louis-San Francisco Ry. Co.*, 265 F. Supp. 56 (ND Ala); *Choate* v *Caterpillar Tractor Co.* 274 F. Supp. 776 (S.D. Ill.)—both reversed after the enactment of the ADEA, 406 F 2d 399 (C.A. 5) and 402 F. 2d 357 (C.A. 7). The Senate Committee was specifically made aware of this impediment to prompt relief in the courts, as a result of its contemporaneous consideration of proposed legislation to improve enforcement of Title VII. See, *e.g.*, testimony of Jack Greenberg (Counsel to the NAACP Legal Defense Fund) that many Title VII "cases [were] hung up on such technical-procedural questions as exhaustion of administrative remedies," citing *Dent*, *supra*. Hearings on S. 1308, S. 1667 (Equal Employment Opportunity) before the Subcommittee on Employment, Manpower and Poverty of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., pp. 109, 111 (1967). The phrase "notice of intent to sue" in the ADEA was thus chosen to contrast with the "Notice of Right to Sue" letter issued by the EEOC upon completion of its administrative proceedings. See 29 CFR 1601.25 in 30 Fed. Reg. 8407).

of Title VII (*see supra*, pp. 15–18).[20] This is, accordingly, a case in which the "congressional purpose is effectuated by tolling the statute of limitations" (*Burnett* v. *New York Central Railroad Co.*, 380 U.S. 424, 427).

B. THE LANGUAGE AND HISTORY OF THE ACT PROVIDE NO INDICATION THAT CONGRESS INTENDED TO PRECLUDE ABSOLUTELY THE CLAIMS OF ELDERLY EMPLOYEES WHOSE NOTICES FAILED TO MEET THE TIME REQUIREMENTS OF SECTION 7(d)

Petitioner argues (Br. 30–35) that the 180-day requirement is a jurisdictional prerequisite to suit rather than a statute of limitations and that Congress intended that failure to meet the 180-day time limitation would constitute an absolute bar to vindication of age discrimination claims. A comparison of the language used in the notice provision of Section 7(d) with the wording of the time limitation undermines petitioner's argument. The requirement that notice

[20] That relaxation, rather than tightening, of the requirements was the intention is confirmed by the fact that the language in question first appeared, not in a source reflecting employer interest, but in an amendment proposed by the American Federation of Labor (AFL–CIO), which provided in part that "[b]efore instituting any action to enforce this Act * * *, an employee shall appropriately notify the Secretary of his intention to bring such an action * * *." See Senate ADEA Hearings, *supra*, at p. 101. The amendment was "primarily concerned" with adapting the procedures of the FLSA, as suggested by Senator Javits (see *supra*, p. 16), in order to utilize "individual suits" and "injunction proceedings" to enforce the Act. See Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 (Age Discrimination in Employment) before the General Subcommittee on Labor of the House Committee on Education and Labor, 90th Cong., 1st Sess., pp. 420–421 (1967).

be given prior to suit is couched in absolute terms. "No civil action may be commenced * * * until the individual has given * * * notice * * *." 29 U.S.C. 626(d). By contrast the timing requirement simply states, in the familiar terminology of statutes of limitations, that notice "shall be filed * * * within one hundred eighty days after the alleged unlawful practice occurred." 29 U.S.C. 626(d)(1). Indeed, the language chosen by Congress to establish the time requirement follows closely the language establishing the charge filing period in Title VII, language that the Court has previously characterized as a statute of limitations. *Occidental Life Insurance Co.* v. *Equal Employment Opportunity Commission*, No. 76–99, decided June 20, 1977, slip op., pp. 15–16.[21] Moreover, as the court of appeals pointed out (App. 20), there is substantial precedent for allowing equitable coniderations to toll the 180-day charging requirement of Title VII.[22]

Nothing in the language of Section 7(d) suggests that Congress intended that failure to meet the time requirement would terminate a complainant's rights.

[21] Both Title VII (Section 706f(1)) and the ADEA (Section 7(e)) also have a time limit upon filing a suit in court, emphasizing that there are two forums for enforcement, each with its own statutory time limitation.

[22] See, *e.g.*, *Laffey* v. *Northwest Airlines*, C.A. D.C., Nos. 74–1791 and 75–1334, decided October 20, 1976, amended September 8, 1977; *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F. 2d 924, 926–29 (C.A. 5); contra, *Hinton* v. *CPC International, Inc.*, 520 F. 2d 1312, 1314–1316 (C.A. 8).

Indeed, the chosen language also contrasts sharply with the wording of the overall two-year period for filing suit in the very next paragraph, Section 7(e),[23] which reads "* * * every such action *shall be forever barred unless* commenced within two years after the cause of action accrued * * *" (29 U.S.C. 255(a); emphasis added). Yet even that provision has consistently been held not to be an absolute cut-off of the right to sue (*Hodgson* v. *Humphries,* 454 F. 2d 1279, 1283–1284 (C.A. 10); *Mumbower* v. *Callicott,* 526 F. 2d 1183, 1187 n. 5 (C.A. 8)), and therefore to be subject to tolling under traditional principles (*Ott* v. *Midland-Ross Corp.,* 523 F. 2d 1367, 1370 (C.A. 6); and see *Bingham* v. *Advance Industrial Security, Inc.,* 138 Ga. App. 875, 228 S.E. 2d 1). There is no apparent reason why Congress should have intended the initial 180-day period for filing notice with the Secretary to be more inflexible than the overall two-year period for actually filing the action.

The legislative history of the 180-day period is likewise devoid of any indication that the proposed time period would serve as an absolute cut-off of rights rather than as a typical time limitation. The time period was referred to as a "statute of limitations," both when it was first proposed by an industry spokesman and when it was subsequently added to

[23] Section 7(e) of the ADEA incorporates by reference Section 6 of the Portal-to-Portal Act of 1947, 61 Stat. 84, as amended, 29 U.S.C. 21 *et seq.*

the bill in committee.[24] And there was no suggestion in any form that the "recogniz[ed] judicial power to toll [such] statutes" (*American Pipe & Construction Co.* v. *Utah, supra,* 414 U.S. at 558) would not apply.

No plausible congressional purpose would be served by reading the time limit as creating an inflexible cut-off of the right to sue when the Secretary has in fact accepted the complainant's notification of the claim and, after promptly advising the person charged, has fully performed the prescribed mediation function within the time provided. To forfeit the complainant's right to sue in such circumstances, because of a formal defect in the original notification and lateness of the corrective notice, would be to disregard the fact that time limits are "primarily designed to assure fairness to defendants" (*Burnett* v. *New York Central Railroad Co., supra,* 380 U.S. at 428). It would, moreover, contravene the settled doctrine that the "policy of repose" which underlies time limits does not

[24] A representative of the U.S. Chamber of Commerce proposed that "[a] short statute of limitations should be adopted" similar to that in Title VII, "[l]imiting the time for making claims" (House ADEA Hearings, *supra,* at p. 63). The minutes of the Senate Committee on Labor and Public Welfare states, in pertinent part:

"Senator Javits offered an amendment to Page 11, Line 24, relating to the statute of limitations. Without objection, the amendment was agreed to." [Minutes, November 1, 1967, p. 7.]

Senator Javits' amendment was in terms identical to paragraphs (1) and (2) in Section 7(d) of the ADEA as enacted (29 U.S.C. 626(d)(1), (2)).

require forfeiture of rights where its objectives are "outweighed [by] the interests of justice" (380 U.S. at 428). Finally, it would be inconsistent with the remedial and humanitarian nature of the statute and the principle of statutory construction that requires such statutes to be liberally interpreted in effectuation of the legislative purpose (App. 32). "The Act should not be construed to make it a trap for the unwary, nor should it require every claimant to retain counsel experienced in the technicalities of age discrimination litigation." *Eklund* v. *Lubrizol Corp.*, 529 F. 2d 247, 251 (C.A. 6) (McCree, J., dissenting), Cf. *Burnett* v. *New York Central Railroad Co., supra,* 380 U.S. at 427–428.

Petitioner characterizes the notice provision as "jurisdictional," but as the Courts of Appeals for the Fifth, and Tenth Circuits both have noted, this usage reflects a "conceptual confusion" in failing to distinguish between, on the one hand, procedural requirements which may not be waived but whose time limits are nevertheless subject to equitable tolling and, on the other hand, absolute requirements which are *sine qua non* to the courts' exercising any powers at all (App. 32–33; *Reeb* v. *Economic Opportunity, Atlanta Inc.*, 516 F. 2d 924, 928 (C.A. 5)). For example, in *Powell* v. *Southwestern Bell Telephone Co.*, 494 F. 2d 485 (C.A. 5), on which petitioner relies, the court used the term "jurisdictional," but the same court twice thereafter made it clear that that characterization in *Powell* did not imply absence of power

to toll the time limit. *Charlier* v. *S. C. Johnson & Son, Inc.*, 556 F. 2d 761 (C.A. 5); *Edwards* v. *Kaiser Aluminum and Aluminum Sales, Inc.*, 515 F. 2d 1195 (C.A. 5).[25] Likewise, the Fifth Circuit has made it clear with respect to time limits on filng a charge under Title VII (42 U.S.C. 2000e–5(e)) that its characterization of time limits as "jurisdictional" in prior decisions did not imply the unavailability of judical relief by equitable tolling (*Reeb* v. *Economic Opportunity Atlanta Inc.*, supra, 516 F. 2d. at 928):

> The *ratio decidendi* * * * of the leading cases dealing with timing requirements in general under the Act [Title VII] compels the conclusion that the ninety day requirement [amended in 1972 to 180 days] is not "jurisdictional" in the sense that compliance with it *vel non* determines the jurisdiction of the district court, without respect to any of the other circumstances in a particular case. We accept the view

[25] Similarly, the Third Circuit, in ruling that Section 14(b) of the ADEA, 29 U.S.C. 633(b), requires prior resort to state procedures as a "jurisdictional" prerequisite to private suits under the Act, has in the same breath excused noncompliance with that requirement on "equitable grounds." *Rogers* v. *Exxon Research & Engineering Co.*, 550 F. 2d 834, 844 (C.A. 3), petition for certiorari filed (April 20, 1977, No. 76–1451); *Goger* v. *H. K. Porter Co., Inc.*, 492 F. 2d 13, 17 (C.A. 3). Contrary to petitioner's contention (Br. 32), the Court of Appeals for the Eight Circuit left open the question whether technical satisfaction of the notice requirement was an absolute prerequisite to suit. *Moses* v. *Falstaff Brewing Corp.*, 525 F. 2d 92, 94 (C.A. 8). But cf. *Eklund* v. *Lubrizol Corp.*, 529 F. 2d 247 (C.A. 6), and see *id.* at 251 (McCree, J., dissenting).

> that the requirement should be analogized to statutes of limitations. Equitable modifications, such as tolling and estoppel, that are applied to them should also be applied here.[26]

That analysis is equally compelling as to the requirement in Section 7(d) of the ADEA that "notice shall be filed * * * within one hundred and eighty days." In the absence of either statutory language or legislative history suggesting that the failure to meet the time limitation absolutely forfeits the age discrimination claim, the court of appeals correctly held "that while section 626(d)(1)'s notice of intent-to-sue requirement cannot be waived, the 180-day time limitation should be interpreted as being subject to possible tolling and estoppel" (App. 33).

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[26] This analysis is also applicable to the broad use of the term "jurisdictional" by this Court in *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 240. The decision in *Robbins & Myers* did not turn on whether the time limit in question was an absolute barrier and therefore not tollable in any circumstances. The Court decided only that the claimant's resort to grievance procedures was not a sufficient basis for tolling the statutory time limit, since those procedures did not relate to the statutory claim at bar, but to "an independent claim based on a *contract* right" which rested on different underlying policies (429 U.S. at 238; emphasis in original). Likewise in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, which *Robbins & Myers* cites in this regard, there was no occasion to consider whether the time limit was absolute and could not be tolled. The filing in that case had in fact been timely, and the Court's reference to "jurisdictional requirements" was made in connection with its conclusion that all of the statutory requirements had been met (415 U.S. at 47). Finally, as the *Robbins & Myers* opinion itself makes clear (429 U.S. at 237–238), there was no intent to modify the principles expressed in *Burnett*, *supra*, as to the availability of tolling on equitable grounds.

C. IN THIS CASE, RESPONDENT'S CONSCIENTIOUS EFFORTS TO ESTABLISH HER CLAIM MADE TOLLING APPROPRIATE DURING THE TIME WITHIN WHICH RESPONDENT PURSUED AN IDENTICAL CAUSE OF ACTION BASED UPON IDENTICAL FACTS IN THE ALTERNATIVE ADMINISTRATIVE FORUM PROVIDED BY THE ACT

This is not the case of a claimant who has "slept on [her] rights" (*Burnett*, *supra*, 380 U.S. at 429). The instant claimant moved within days of the alleged discrimination to assert her claims under the Act. She sought legal counsel almost immediately after the discharge and promptly notified the Department of Labor of her claim. During the ensuing period of conferences between the Department and petitioner, respondent made repeated telephone inquiries as to the progress of the case. Finally, when on the 217th day after the discharge she was notified by the Department that she was entitled to file private suit, she immediately turned to private counsel again. Within nine days of the Department's notification she had filed a notice of intention to sue as prescribed by Section 7(d), correct as to form and content, but delayed, without fault on her part, 46 days beyond the 180-day period specified in the section. The court of appeals summarized the situation correctly, when it concluded (App. 36):

> We cannot fault [respondent] in her efforts to present her cause. She twice promptly sought private legal advice and twice promptly followed that advice. Short of anticipating an administrative dereliction by the Wage and Hour Division, despite her prodding of that agency, it was not to be expected that lapse of time

> would void her cause. This is not a case of a plaintiff sleeping on her rights nor a defendant in any way being prejudiced thereby either presumptively or in fact. In light of these circumstances and the *de facto* fulfillment of the main purposes of the Act, we hold that the time limitation was tolled until the filing of [respondent's] notice of intent to sue.

This Court's decisions in *Burnett* and *Robbins & Myers* support the decision of the court of appeals. In *Burnett,* the plaintiff asserted a claim under the Federal Employers' Liability Act (35 Stat. 65, as amended, 45 U.S.C. 51 *et seq.*) in a state court, which had concurrent jurisdiction over such claims with the federal courts. The state court suit was dismissed because of improper venue and plaintiff thereafter filed a new complaint in the United States District Court. This Court held that the state court filing tolled the applicable limitations period, stating (380 U.S. at 429–430):

> Petitioner here did not sleep on his rights but brought an action * * *. Respondent could not have relied upon the policy of repose embodied in the limitation statute, for it was aware that petitioner was actively pursuing his FELA remedy * * *.

In *Robbins & Myers* the question was whether the time period for filing charges with the EEOC under Title VII was tolled while complainant pursued grievance proceedings under a collective bargaining

agreement.[27] Although declining to permit tolling in those circumstances, the Court expressed no doubt as to the general tolling doctrine. *Burnett* was distinguished on the ground that there the plaintiff had been asserting "the same statutory claim" in the State proceedings as in the federal action at bar (429 U.S. at 238). In contrast, the Court noted, the plaintiff in *Robbins & Myers* had been "asserting an independent claim based on a *contract* right" (*ibid.*, emphasis in original).

> Adherence to the limitations period assures prompt notification to the employer of a charge of an alleged violation of Title VII * * *. The grievance process assures no such comparable notice. * * * Even if racial discrimination is explicitly discussed, * * * the grievance procedure properly involves only *contractual* questions, and would but fortuitously implicate the Title VII standards. [429 U.S. at 240–241, n. 14; emphasis in original.][28]

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[27] The plaintiff in *Robbins & Myers* had filed a charge of racial discrimination with the EEOC 84 days after completion of the grievance steps provided for in the collective-bargaining agreement but 108 days after the date of her discharge (429 U.S. at 232).

At the time of the discharge complained of, Section 706(d) in Title VII, 42 U.S.C. 2000e–5(d), provided that "[a] charge under subsection (a) of this section shall be filed within [90] days after the alleged unlawful employment practice occurred." The 1972 amendments to Title VII extended this limitations period from 90 days to 180 days. At the same time, Section 706(d) was renumbered as Section 706(e), Equal Employment Opportunity Act of 1972, 86 Stat. 105, as amended, 42 U.S.C. (Supp. V) 2000e–5(e).

[28] See *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, where this Court held that the timely filing of a charge with the

In the instant case, unlike *Robbins & Myers,* the proceedings prior to the filing of suit fulfilled the policies of the applicable notice requirement and of its time limit. Here, the plaintiff's invocation of the Secretary's aid was based on the same cause of action as the suit itself (see 29 U.S.C. 623(a)), and presented the same legal and factual issues for resolution. The Secretary's resulting mediation activities were performed under the mandate of the very statute under which the suit was brought, and were precisely what was required by the provision on which petitioner relies. See 29 U.S.C. 626(d). Accordingly, the employer was from the beginning fully apprised of what it would have to defend against if failure of the statutory mediation procedures should lead to litigation. This is preciseiy the situation for application of the teachings of *Burnett* since the purpose of the time limitations to prevent the litigation of "stale claims" has been satisfied and "the humanitarian purpose of the [Act] makes clear that Congress would not wish a plaintiff deprived of his rights when no

EEOC pursuant to Section 706 of Title VII did not toll the running of the statute of limitations applicable to an action, based upon the same facts, under 42 U.S.C. 1981. In reaching that conclusion, this Court emphasized (421 U.S. at 467; footnote omitted):

> [P]erhaps most importantly, the tolling effect given to the timely prior filings in *American Pipe* and in *Burnett* depended heavily on the fact that those filings involved exactly the same cause of action subsequently asserted. This factor was more than a mere abstract or theoretical consideration because the prior filing in each case necessarily operated to avoid the evil against which the statute of limitations was designed to protect.

policy underlying the statute of limitations is served in doing so" (380 U.S. at 434).[29]

II.

THE NOTICE REQUIREMENT IN SECTION 7(d) OF THE ACT IS SATISFIED WHEN AN AGGRIEVED PERSON LODGES A TIMELY COMPLAINT OF AGE DISCRIMINATION IN EMPLOYMENT, ASSERTING HIS RIGHTS UNDER THE ACT AND THE SECRETARY OF LABOR PROMPTLY NOTIFIES THE EMPLOYER, EVEN IF THE COMPLAINT DOES NOT EXPLICITLY REFER TO AN INTENT TO FILE PRIVATE SUIT

While the court of appeals properly held that the 180-day time limit in Section 7(d) of the Act was subject to tolling and was in fact tolled, its decision is equally sustainable on the ground that respondent's original communication was sufficient to satisfy the Section 7(d) requirement.[30]

The rejection of the adequacy of respondent's initial communication to the Secretary by the courts below (see App. 18, 29) was based on a literal reading of Section 7(d), which speaks of a "notice of intent to file [a civil] action." 29 U.S.C. 626(d). But, "[w]hen

[29] See also *American Pipe & Construction Co.* v. *Utah*, *supra*, 414 U.S. at 552–553.

[30] Out of an abundance of caution Mr. Speer, the Assistant Area Director of the Department's Wage and Hour Division, notified Ms. Dartt that "[t]he fact that you submitted information concerning an alleged unlawful practice has not been considered a notice to the Secretary of Labor of intent to file suit" (App. 69). The same precautionary effort to adhere strictly to a literal reading of the Act's procedural requirements caused Speer to reinitiate conciliation upon receipt of the formal notice of intent to sue, even though the Labor Department had already satisfied its responsibility to conciliate under the identical statutory mandate of Section 7(b). It is our contention, however, that Ms. Dartt's action in lodging a complaint with the Secretary satisfied the requirements of Section 7(d).

[the plain] meaning has led to absurd or futile results, * * * this Court has looked beyond the words to the purpose of the Act" and "even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." *United States* v. *American Trucking Ass'ns,* 310 U.S. 534, 543 (footnotes omitted); and see *Perry* v. *Commerce Loan Co.,* 383 U.S. 392, 400.

Adherence to a strictly literal reading of the instant provision would lead to just such unjustified results, requiring the forfeiture of statutory rights because of verbal variances in the employee's notice to the Secretary that cause no prejudice to any party in interest and that have no relation to any of the purposes of the Act. Admittedly, respondent's original communication to the Secretary here made no express reference to "an intent to file [civil] action." But as appears from the discussion in point I, *supra,* pp. 20–22, it satisfied all of the objectives of Section 7(d), since it invoked the employee's rights under the Act, afforded the Secretary an early opportunity to undertake the conciliation measures directed by the Section (which he promptly did), and resulted in the almost immediate notification of the employer of everything it needed to know to protect its interests. An explicit statement to the Secretary of an intention to file suit would have added nothing of practical consequence to either the employer or the public.[31]

[31] Petitioner objects that Dartt's complaint to the Department was made in person and not by written communication (Br. 20–21). But that fact in no way affected the notice and conciliation objectives of Section 7(d), since the Department accepted the oral complaint, notified the employer, and initiated the conciliation efforts contemplated by the section. While the Department could have rejected the oral representations and required a written formal document (see *Hays* v. *Republic Steel Corp.,* 531 F. 2d 1307, 1312 (C.A. 5)), it did not do so. Obviously, no prejudice to the employer accrued from the fact that the original complaint was not in writing. Moreover, Section 7(d) contains no requirement that any document be submitted. In this it conspicuously departs from the pre-existing corresponding provision of Title VII which required a "charge[ ] in writing under oath" (Section 706(a), 42 U.S.C. 2000e–5(a); now Section 706(b), 42 U.S.C. (Supp. V) 2000e–5(b)). See, *e.g.*, *Sutherland* v. *SKF Indus., Inc.,* 419 F. Supp. 610, 615–617 (E.D. Pa.); *Smith* v. *Jos. Schlitz Brewing Co.,* 419 F. Supp. 770, 774–776 (D. N.J.); *Cowlishaw* v. *Armstrong Rubber Co.,* 425 F. Supp. 802, 807 (E.D. N.Y.).

To require a lay grievant to formulate his complaint in the precise terms of the statute or with a degree of explicitness unnecessary to the statutory purposes would be to elevate form over substance. In a comparable context under Title VII, this Court declined, in *Love* v. *Pullman Co.,* 404 U.S. 522, to require literal compliance where the steps taken fulfilled the legislative objectives of those provisions. There the complainant failed to commence proceedings initially in the appropriate state agency as required by the literal terms of Title VII (42 U.S.C. 2000e–5(b), (d)), but the EEOC had "orally advised" the State authorities that it had received the claimant's charge (404 U.S. at 524). This Court held that the oral advice by the agency was sufficient to satisfy the requirements of the statute because it fulfilled the legislative purpose by initiating state proceedings

and assuring expeditious handling of the claim (404 U.S. at 525). Here also, by initiating conciliation efforts by the Secretary and assuring prompt notice to the employer, the procedures followed fully satisfied the legislative purposes of Section 7(d), notwithstanding their nonprejudicial variance from the literal terms of the statute. See pages 20–22 *supra*. To require literal compliance in these circumstances "would serve no purpose other than the creation of an additional procedural technicality" (404 U.S. at 526).

"Such technicalities," the Court recognized in *Love*, "are particularly inappropriate in a statutory scheme [there, Title VII] in which laymen, unassisted by trained lawyers, initiate the process" (404 U.S. at 527). The ADEA complainant is hardly likely to have engaged private counsel at the point where he first communicates with the Secretary. Many aggrieved persons (as in the instant case) will not even know that they have a private right of action. And for those that do, there may well not be sufficient occasion, before the Secretary investigates, to decide whether to exercise it.

It is highly unlikely that Congress would have intended to limit the right of private action to those persons astute enough, or litigious enough, to have consulted counsel, or to have decided upon private action without such consultation, before applying to the Secretary for help. On the contrary, the Act's emphasis on the resolution of claims by "informal methods of conciliation, conference, and persuasion"

(Section 7(b), (d)) emphasizes the congressional assumption that the decision to resort to litigation ordinarily would not be made until and unless those methods failed to achieve settlement. Since the Act relies in great part on claims initiated by the victims of discrimination to rectify violations of its provisions (see *supra*, p. 4 and n. 3), the effectuation of its objectives would be substantially undermined by a construction requiring the victim of discrimination to make a difficult choice of enforcement alternatives, normally requiring resort to legal advice, before he can invoke the Secretary's mediation efforts and bring the Act's enforcement machinery into play.

Moreover, the legislative history discussed *supra*, pp. 14–18 and nn. 18, 19, shows that relaxation of the procedural requirements that had hindered effectuation of Title VII was a primary consideration in the decision to depart from the enforcement provisions of that statute. The decision below, however, would make the ADEA's notice requirement more stringent and formalistic than its counterpart in Title VII.[33]

Since the literal construction of Section 7(d) for which petitioner contends leads to so self-defeating a result, it should not be adopted. Nothing in the legis-

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[33] It is established under Title VII that a defective but otherwise timely charge may be cured by amendments which relate back to the original filing date, so long as the original charge contained enough information to effectuate the purposes of the charging requirement (see n. 17, *supra*, p. 20). See, *e.g.*, *Georgia Power Company* v. *Equal Employment Opportunity Commission*, 412 F. 2d 462 (C.A. 5); *Blue Bell Boots, Inc.* v. *Equal Employment Opportunity Commission*, 418 F. 2d 355 (C.A. 6).

lative history or the statutory purpose requires that construction or even supports it, and its rejection would not prejudice the petitioner in any way. "[T]he fair interpretation of a statute," this Court has said, "is often 'the art of proliferating a purpose,' * * * revealed more by the demonstrable forces that produced it than by its precise phrasing." *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 489. The judgment of the court of appeals was therefore correct, even apart from the ground adopted by that court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 1977.

U.S. GOVERNMENT PRINTING OFFICE: 1977